

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 41

THOMAS SCHWARTZ, PETITIONER,

vs.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF
THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED APRIL 22, 1952

CERTIORARI GRANTED JUNE 9, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 730

THOMAS SCHWARTZ, PETITIONER,

vs.

THE STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF TEXAS

INDEX

	Original	Print
Record from the Criminal District Court No. 2, Dallas County, Texas	1	1
Caption (omitted in printing)	1	
Time and manner of presentment	1	1
Order of transfer	1	1
Order of receiving	2	2
Indictment	2	2
Charge of the court	5	4
Verdict	13	12
Judgment	14	12
Court's further offered charge	16	13
Defendant's special requested charge No. 2 and order refusing	17	14
Defendant's objections and exceptions to the Court's main charge and order thereon	18	15
State's motion to dismiss firearms charge from 1st and 2nd counts of indictment	19	16
Order dismissing firearms charge from 1st and 2nd counts of indictment	20	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 28, 1952.

Record from the Criminal District Court No. 2, Dallas
County, Texas—Continued

	Original	Print
Defendant's objections and exceptions to order dismissing firearms charge	20	17
State's motion to dismiss third count of indictment and order granting	21	17
Defendant's objection to playing of phonograph recordings and order overruling	22	18
Defendant's first amended motion for a new trial	25	21
State's answer to defendant's amended motion for new trial	31	25
State's exhibit "A"—Affidavit of J. E. Sellers	33	28
Order overruling amended motion for a new trial and notice of appeal	35	28
Orders granting extensions of time to file bills of exceptions	36	29
Defendant's bill of exception No. 1 and order overruling same	39	30
State's exhibits Nos. 4, 5, 6, 7, 8 & 9—Recordings of telephone conversations between W. T. Jarrett and T. Schwartz, March 18, 19, and 21, 1950	43	34
No qualification to bill of exception No. 1	55	44
Defendant's bill of exception No. 2	57	45
No qualification to bill of exception No. 2	59	47
Defendant's bill of exception No. 3—excerpts from testimony of Thomas Schwartz and court's qualification	61	47
Defendant's bill of exception No. 4—excerpts from testimony of Kate Graham and court's qualification	72	56
Defendant's bill of exception No. 5—colloquy between court and counsel and court's qualification	76	59
Defendant's bill of exception No. 6 and court's qualification	91	71
Sentence	98	76
Clerk's certificates (omitted in printing)	99	
Statement of facts	103	77
Appearances	103	77
Testimony of Mrs. Minnie Shortal	104	78
C. E. DeWitt	111	82
William Trent Jarrett	116	86
Hubert Davis	180	126
Jessie Lee Thomas	187	131
State's exhibit No. 12—Testimony of Defendant Schwartz before the Dallas County Grand Jury, March 21, 1950	189	132
Testimony of Miss Kate Graham	227	156
Testimony of Thomas Schwartz	231	158

Record from the Criminal District Court No. 2, Dallas
County, Texas—Continued

Statement of facts—Continued

	Original	Print
Testimony of Lester Emmett Bennett	275	187
Defendant's exhibit No. 2—Relator's petition and affidavit filed September 5, 1950 in re application for writ of habeas corpus, Lester Emmett Bennett, Relator	294	199
Defendant's exhibit No. 3—Excerpt from relator, Lester Emmett Bennett's application for a writ of habeas corpus, filed July 8, 1950	299	203
Testimony of William Trent Jarrett (recalled)	312	211
Testimony of J. E. Sellers	313	212
State's exhibits Nos. 4, 5, 6, 7, 8 & 9 (copies) (omitted in printing)	318	
Note re State's Exhibits Nos. 1, 2, 3	336	215
State's Exhibit No. 11—Photostatic copy of Application for a Western Union Money Order, dated March 2, 1950, \$50.00, from T. J. Stewart, Dallas, to Louise Kendrick, Houston, Texas	339	216
Note re State's Exhibit No. 13	340	217
State's Exhibit No. 14—Photostatic copy of Western Union Money Order Draft, dated March 2, 1950 payable to Louise Kendrick, Houston, Texas	341	218
Defendant's Exhibit No. 1—Receipt for \$7.21 Air Express Shipment of diamonds from B. J. Fink, Chicago, Illinois to Thomas Schwartz, Dallas, Texas	342	218
Reporter's certificate (omitted in printing)	343	
Stipulation of attorneys approving statement of facts	343	219
Judge's approval to statement of facts	344	219
Clerk's certificate (omitted in printing)	345	
Proceedings in Court of Criminal Appeals of the State of Texas	346	220
Opinion, Morrison, J.	346	220
Motion for rehearing	353	226
Opinion on motion for rehearing	403	232
Clerk's certificate (omitted in printing)	405	
Order staying issuance of mandate	406	234
Order allowing Certiorari	408	235

[fol. 1]

[Caption omitted]

**IN CRIMINAL DISTRICT COURT, DALLAS COUNTY,
TEXAS**

No. 7768-AB

THE STATE OF TEXAS

vs.

THOMAS SCHWARTZ

ACCOMPLICE TO ROBBERY

TIME AND MANNER OF PRESENTMENT—March 28, 1950

On this the 28th day of March, A. D. 1950, came the Grand Jury for the body of the County of Dallas, a quorum being present, presented and delivered to the judge of the Criminal District Court of Dallas County, Texas, the following bill of indictment, endorsed "A True Bill" and signed by their foreman, George Young, to-wit:

IN CRIMINAL DISTRICT COURT, DALLAS COUNTY, TEXAS

[Title omitted]

ORDER OF TRANSFER—March 28, 1950

On this the 28th day of March, A. D. 1950, it is the order of the Judge of the Criminal District Court of Dallas County, Texas, that the following styled and numbered cause be, and the same is hereby transferred to the Criminal District Court No. 2 of Dallas County, Texas, for trial and final adjudication, to-wit; No. 7768-A, The State of Texas vs. Thomas Schwartz.

(S.) Robert A. Hall, Judge Criminal District Court,
Dallas County, Texas.

[fol. 2] IN CRIMINAL DISTRICT COURT, DALLAS COUNTY,
TEXAS

ORDER OF RECEIVING—March 28, 1950

On this the 28th day of March, A. D. 1950, it is the order of the Judge of the Criminal District Court No. 2 of Dallas County, Texas, that the following styled and numbered cause be, and the same is hereby received from the Criminal District Court of Dallas County, Texas, for trial and final adjudication, to-wit:

(S.) Henry King, Judge, Criminal District Court
No. 2, Dallas County, Texas.

IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY, TEXAS

INDICTMENT—Filed March 28, 1950

In the Name and by the Authority of the State of Texas, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court, of Dallas County, at the January Term, A. D. 1950, of said Court that one William Trent Jarrett on or about the 17th day of February, in the year of our Lord One Thousand Nine Hundred and Fifty with force and arms, in the County and State aforesaid, did unlawfully in and upon Mrs. Minnie Shortal make an assault, and did then and there, by said assault, and by violence to the said Mrs. Minnie Shortal, and by putting the said Mrs. Minnie Shortal in fear of life and bodily injury, and then and there by using and exhibiting a firearm, to-wit, a pistol, fraudulently and without the consent of the said Mrs. Minnie Shortal, take from the person and possession of her, the said Mrs. Minnie Shortal, three diamond rings, the same being the property of the said Mrs. Minnie Shortal, with the intent to deprive the said Mrs. Minnie Shortal of the same and to appropriate the same to his, the said William Trent Jarrett's own use;

[fol. 3] and the Grand Jurors aforesaid, upon their oaths, do further present in and to said Court, that, Thomas Schwartz, on or about the 17th day of February, A. D. 1950, and prior to the commission of the said offense by the said William Trent Jarrett, as aforesaid in the county and state aforesaid did, unlawfully and wilfully, advise, command and encourage the said William Trent Jarrett, to commit the said offense; and the said Thomas Schwartz not being present at the commission of said offense by the said William Trent Jarrett;

And the Grand Jurors Aforesaid, upon their oaths aforesaid, do further present in and to said Court, that heretofore, in the County of Dallas and in the State of Texas, on or about the 17th day of February, A. D. 1950; the said William Trent Jarrett did unlawfully in and upon Mrs. Minnie Shortal make an assault, and did then and there, by said assault, and by violence to the said Mrs. Minnie Shortal, and by putting the said Mrs. Minnie Shortal in fear of life and bodily injury, and then and there by using and exhibiting a firearm, to-wit, a pistol, fraudulently and without the consent of the said Mrs. Minnie Shortal, take from the person and possession of her, the said Mrs. Minnie Shortal, three diamond rings, the same being the property of the said Mrs. Minnie Shortal, with the intent to deprive the said Mrs. Minnie Shortal, of the same and to appropriate the same to his, the said William Trent Jarrett's own use; and the Grand Jurors aforesaid, upon their oaths, do further present in and to said Court, that, Thomas Schwartz, on or about the 17th day of February, A. D. 1950, and prior to the commission of the said offense by the said William Trent Jarrett, as aforesaid in the county and state aforesaid, did unlawfully and wilfully prepare and furnish arms and aid to the said William Trent Jarrett, for the purpose of assisting the said William Trent Jarrett in the [fol. 4] commission and execution of said offense; the said Thomas Schwartz not being present at the commission of said offense by the said William Trent Jarrett;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present in and to said Court, that heretofore, in the County of Dallas and in the State of Texas, on or about the 17th day of February, A. D. 1950, the said

Thomas Schwartz did fraudulently receive from William Trent Jarrett and did fraudulently conceal, certain property, to-wit, three diamond rings, the same being the property of Mrs. Minnie Shortal, the same being over the value of \$5000.00; which said property had been theretofore acquired by another in such manner as that the acquisition thereof comes within the meaning of the term theft; and the said Thomas Schwartz then and there received and concealed the said property, knowing the same to have been so acquired.

Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

(S.) George Young, Foreman of the Grand Jury.

(S.) Will R. Wilson, Criminal District Attorney of Dallas County, Texas.

Endorsement on Instrument: No. 7768-AB. The State of Texas vs. Thomas Schwartz. A True Bill. Foreman of the Grand Jury. Filed Mar. 28, 1950. Bill Shaw, Dist. Clerk, Dallas County, Texas. By (S.) John H. Norman, Deputy. State Witnesses: Mrs. Minnie Shortal, 4806 Swiss Ave., Dallas; Hubert Davis, 2804 Elm St., Dallas; Marjorie Towels, 2034 Main, Dallas; C. E. DeWitt, Gulf Ins. Co., C-8058, Dallas; W. L. Townsley, 2034 Main, Dallas; Lester E. Bennett; William T. Jarrett; Jessie Thomas, 4217 Swiss Ave., Dallas; Kate Graham, 4806 Swiss, Dallas; Abe Meyer, 1810 Mayflower; Earl B. Messengill, 9046 Ridondo; W. M. Maddox, 5805 Belmont; Helen Pace Williams, 7210 Lakewood Blvd.; Bobbie May; J. E. Sellers, 1235 N. W. Winnetka, Dallas; George Young, 3605 Standord, Dallas.

[fol. 5] IN CRIMINAL DISTRICT COURT, No. 2, DALLAS COUNTY,
TEXAS, JANUARY TERM, 1951

[Title omitted]

CHARGE OF THE COURT—Filed February 9, 1951

Gentlemen of the Jury:

The third count of the indictment, charging the offense of Receiving and Concealing Stolen Property over the

value of \$50.00, knowing the same to have been stolen, has been dismissed from the indictment and you are instructed not to consider said third count for any purpose.

You are further instructed that the following wording, "and then and there by using and exhibiting a firearm, to wit, a pistol", is dismissed from Counts Numbers 1 and 2 of the indictment, and you are instructed not to consider the said wording for any purpose.

The Defendant, Thomas Schwartz, stands charged by indictment in the first count thereof with the offense of being an accomplice to the offense of robbery, the said first count of the indictment alleging that one William Trent Jarrett did, by assault, violence and by putting Mrs. Minnie Shortal in fear of life and bodily injury, fraudulently and without the consent of the said Mrs. Minnie Shortal, take from the person and possession of Mrs. Minnie Shortal three (3) diamond rings, and that the same was the property of the said Mrs. Minnie Shortal, with the intent to deprive the said Mrs. Minnie Shortal of the same, and to appropriate the same to his, the said William Trent Jarrett's own use; and that it occurred in Dallas County, Texas, on or about the 17th day of February, 1950; and the said first count herein further alleges that the Defendant, Thomas Schwartz, on or about the 17th day of February, 1950, in the County of Dallas and the State of Texas, prior to the commission of the said offense by the said William Trent Jarrett, did unlawfully and wilfully advise, com-[fol. 6] mand and encourage the said William Trent Jarrett to commit the said offense; and that the said Thomas Schwartz was not present at the commission of said offense by the said William Trent Jarrett.

To the first count of the indictment the Defendant has pleaded not guilty.

In the second count of the indictment herein the Defendant Thomas Schwartz, stands charged with the offense of being an accomplice to the offense of Robbery, the said second count in the indictment alleging that one William Trent Jarrett did, by assault, violence and by putting Mrs. Minnie Shortal in fear of life and bodily injury, fraudulently and without the consent of the said Mrs. Minnie Shortal, take from the person and possession of Mrs.

Minnie Shortal three (3) diamond rings, and that the same was the property of the said Mrs. Minnie Shortal, with the intent to deprive the said Mrs. Minnie Shortal of the same, and to appropriate the same to his, the said William Trent Jarrett's own use; and that it occurred in Dallas County, Texas, on or about the 17th day of February, 1950; and the said second count herein further alleges that the Defendant, Thomas Schwartz, on or about the 17th day of February, 1950, in the County of Dallas and State of Texas, prior to the commission of the said offense by William Trent Jarrett, did unlawfully and wilfully prepare and furnish arms and aid to the said William Trent Jarrett for the purpose of assisting the said William Trent Jarrett in the commission and execution of said offense; the said Thomas Schwartz not being present at the commission of said offense by the said William Trent Jarrett.

To the second count of the indictment herein the Defendant has pleaded not guilty.

You are instructed that our Statute provides that, if any person, by assault, or by putting in fear of life or bodily [fol. 7] injury, shall fraudulently take from the person or possession of another any property, with the intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life or for a term of years not less than five (5).

The use of any unlawful violence upon the person of another with intent to injure such person, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself or by words accompanying it an immediate intention, coupled with an ability to commit a battery, is an assault.

By the expression, "coupled with an ability to commit a battery", is meant that the person making the assault, must at the time, be in such position and within such distance of the person assaulted as to enable him to commit a battery on such person by the means used.

You are further instructed that an accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense, or who prepares arms

or aid of any kind prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same.

You are instructed that the punishment for an accomplice to the offense of robbery is the same as the principal offender, as heretofore stated in this charge.

Now, therefore, you are instructed that if you find and believe from the evidence beyond a reasonable doubt that William Trent Jarrett, on or about the 17th day of February, 1950, in the County of Dallas and State of Texas, did unlawfully in and upon Mrs. Minnie Shortal make an assault and did then and there by said assault, if any, or by putting the said Mrs. Minnie Shortal in fear of life or [fol. 8] bodily injury, fraudulently and without the consent of the said Mrs. Minnie Shortal, take from the person and possession of her, the said Mrs. Minnie Shortal, three (3) diamond rings and that the same were the property of the said Mrs. Minnie Shortal, with the intent to deprive the said Mrs. Minnie Shortal of the value of the same and to appropriate the same to his, the said William Trent Jarrett's own use; and you further find and believe from the evidence beyond a reasonable doubt that the defendant, Thomas Schwartz, on or about the 17th day of February, 1950, in the County of Dallas and the State of Texas, and prior to the commission of the said offense by the said William Trent Jarrett, if any he committed, did unlawfully and wilfully advise or command or encourage the said William Trent Jarrett to commit said offense, if any; and that the said Thomas Schwartz was not present at the commission of said offense, if any, committed by the said William Trent Jarrett, if any, then, you will find the Defendant guilty as charged in the first count of the indictment herein and fix his punishment by confinement in the penitentiary for life or for any term of years not less than five (5).

You are further instructed that if you find and believe from the evidence beyond a reasonable doubt that William Trent Jarrett, on or about the 17th day of February, 1950, in the County of Dallas and State of Texas, did unlawfully in and upon Mrs. Minnie Shortal make an assault and did then and there by said assault, if any, or by putting the said

Mrs. Minnie Shortal in fear of life or bodily injury, fraudulently and without the consent of the said Mrs. Minnie Shortal, take from the person and possession of her, the said Mrs. Minnie Shortal, three (3) diamond rings and that the same were the property of the said Mrs. Minnie Shortal, [fol. 9] with the intent to deprive the said Mrs. Minnie Shortal of the value of the same and to appropriate the same to his, the said William Trent Jarrett's own use; and you further find and believe from the evidence beyond a reasonable doubt that the Defendant, Thomas Schwartz, on or about the 17th day of February, 1950, in the County of Dallas and State of Texas, and prior to the commission of the said offense by the said William Trent Jarrett, if any he committed, did unlawfully and wilfully prepare and furnish arms or aid to the said William Trent Jarrett for the purpose of assisting the said William Trent Jarrett in the commission and execution of said offense, if any he committed or executed, and that the said Thomas Schwartz was not present at the commission of said offense by the said William Trent Jarrett, if any he committed, then, you will find the Defendant guilty as charged in the second count of the indictment herein and fix his punishment at confinement in the penitentiary for life or for any term of years not less than five (5).

Both the first and second counts of the indictment are being submitted to you in this charge but in this connection you are instructed that you can find the Defendant guilty only on one count, in the event you find the Defendant guilty. If you find the Defendant guilty as charged in either count of the indictment as submitted to you, you will state in your verdict the count in the indictment on which you find the Defendant guilty, if you do.

You are further instructed that before a person can be found guilty of being an Accomplice to an offense of Robbery the State must prove by legal evidence beyond a reasonable doubt that the robbery was committed; therefore, you are instructed in this case that before you can find the Defendant guilty of being an Accomplice to Robbery, as charged in either count of the indictment submitted to you, [fol. 10] you must first believe that William Trent Jarrett committed the offense of Robbery as charged in the first

and second counts of the indictment herein; and should you have a reasonable doubt as to whether the State has made such proof, then, you will acquit the Defendant.

A conviction cannot be had upon the testimony of an Accomplice unless the jury first believe that the accomplice's evidence is true and that it shows the Defendant is guilty of the offense charged against him; and even then you cannot convict unless the accomplice's testimony is corroborated by other evidence tending to connect the Defendant with the offense charged; and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the Defendant with its commission. You are charged that William Trent Jarrett and Lester Emmett Bennett were accomplices, if any offense was committed, and you are instructed that you cannot find the Defendant guilty upon their testimony unless you first believe that the testimony of the said William Trent Jarrett and Lester Emmett Bennett is true and that it shows the Defendant is guilty as charged in the indictment; and even then you cannot convict the Defendant unless you further find and believe that there is other evidence in the case, outside of the evidence of the said William Trent Jarrett and Lester Emmett Bennett, tending to connect the Defendant with the commission of the offense charged in the indictment; and, then, from all the evidence you must believe beyond a reasonable doubt that the Defendant is guilty.

In connection with the instructions on accomplice testimony hereinbefore set out in this charge, you are instructed that the testimony of an accomplice cannot be used to corroborate the testimony of another accomplice. You are charged that Jarrett and Bennett are accomplices, therefore, the testimony of William Trent Jarrett cannot be used to corroborate the testimony of Lester Emmett Bennett, and the testimony of Lester Emmett Bennett cannot be used to corroborate the testimony of William Trent Jarrett.

If you find and believe from the evidence that the Defendant, Thomas Schwartz, prior to the commission of the offense of Robbery by the said William Trent Jarrett, as alleged in the indictment, if any such offense was committed, did not unlawfully and wilfully advise, or command, or en-

courage the said William Trent Jarrett to commit such an offense, if he did, or if you have a reasonable doubt thereof, then, you will find the Defendant not guilty, as charged in Count No. 1 of the indictment.

If you find and believe from the evidence that the Defendant, Thomas Schwartz, prior to the commission of the offense of Robbery by the said William Trent Jarrett, as alleged in the indictment, if any such offense he committed, did not unlawfully and wilfully prepare and furnish arms, or aid, to the said William Trent Jarrett for the purpose of assisting the said William Trent Jarrett in the commission and execution of the offense of Robbery, as alleged in the indictment, if he committed or executed such an offense, or if you have a reasonable doubt thereof, then, you will find the Defendant not guilty, as charged in Count No. 2 of the indictment.

You are further instructed as a part of the law in this case that although you may find and believe from the evidence that after the commission of the offense charged in the indictment, to wit, the robbery of Mrs. Minnie Shortal on February 17th, 1950, that the three (3) diamond rings alleged in the indictment illegally came into the possession of the said Thomas Schwartz, still you cannot convict the Defendant unless you find beyond a reasonable doubt that [fol. 12] prior to the commission of such offense the Defendant encouraged, commanded or advised the said William Trent Jarrett to rob Mrs. Minnie Shortal, or that he furnished the said William Trent Jarrett arms or aid before the commission, if any, by the said William Trent Jarrett of the offense, if any, as alleged in the indictment as submitted to you in this charge for the specific purpose of robbing the said Mrs. Minnie Shortal; and if you have a reasonable doubt that the Defendant so encouraged, commanded or advised, then, you will acquit the Defendant on the First Count of the indictment; and if you have a reasonable doubt that the Defendant furnished arms, or aid, as aforesaid, then, you will acquit the Defendant on the Second Count of the indictment.

In this connection, the Court again calls your attention to the fact the the Third Count in the indictment has been withdrawn from your consideration, and said Count charging

the Defendant with Receiving and Concealing Stolen Property, and that the Defendant is now on trial for the offense charged in the First and Second County only. From all the evidence in reference to these two (2) Counts, taking into consideration the instruction in regard to the law as hereinbefore given you, if you have a reasonable doubt as to the guilt or innocence of the Defendant, you will acquit him and say by your verdict, "Not Guilty".

You are instructed in this case that certain evidence was admitted before you in regard to the Defendant having been charged with offenses other than the one for which he is now on trial. You are instructed that such evidence cannot be considered against the Defendant as any evidence of his guilt in this cause. Said evidence was admitted before you for the purpose of aiding you, if it does aid you, in passing upon the credibility of the Defendant as a witness for himself in this case, and to aid you, if it does aid you, in deciding [fol. 13] upon the weight you will give to him as such witness, and you will not consider the same for any other purpose.

You are further instructed as part of the law in this case that you must presume no fact or facts against the Defendant, and on any issue of fact if you entertain a reasonable doubt as to the existence or non-existence of same, you will resolve such doubt in favor of the Defendant, and then if you have a reasonable doubt as to the guilt of the Defendant, you will give him the benefit of the doubt and acquit him.

In all criminal cases the burden of proof is on the State. The defendant is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in case you have reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict "not guilty."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

(S.) Henry King, Judge of Criminal District Court
No. 2, Dallas County, Texas.

IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY, TEXAS

VERDICT

We, the jury, find the Defendant guilty of being an Accomplice to the offense of Robbery, as charged in Count No. 1 of the indictment, and assess his punishment at Ninety-nine years confinement in the penitentiary.

(S.) R. C. Foley, Foreman.

[File endorsement omitted.]

[fol. 14] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS, JANUARY TERM, A.D. 1951

February 9, 1951

No. 7768-AB

THE STATE OF TEXAS,

VS.

THOMAS SCHWARTZ

JUDGMENT—February 9, 1951

Being an Accomplice to the Offense of Robbery

Upon written motion of the District Attorney, the following wording of the indictment: "and then and there by using and exhibiting a firearm, to-wit, a pistol" is hereby dismissed from Counts No. 1 and No. 2 of the indictment.

This day this cause was called for trial, and the State appeared by her Criminal District Attorney, and the Defendant Thomas Schwartz appeared in person, his counsel also being present, and both parties announced ready for trial, and the said Defendant in open Court pleaded "Not Guilty" to the charge contained in the indictment herein; thereupon a jury, to-wit: R. C. Foley and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and hav-

ing been duly charged by the Court, retired in charge of the proper officer, to consider of their verdict, and afterward were brought into open Court, by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

We, the jury, find the Defendant guilty of being an Accomplice to the offense of Robbery, as charged in Count No. 1 of the indictment, and assess his punishment at Ninety-Nine years confinement in the penitentiary.

(S.) R. C. Foley, Foreman.

It is therefore considered and adjudged by the Court, [fol. 15] that the said Defendant is guilty of the offense of Being an Accomplice to the offense of Robbery as found by the jury, and that he be punished, as has been determined by the jury, by confinement in the Penitentiary for 99 years, and that the State of Texas, do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue; and that said Defendant is remanded to the Sheriff of Dallas County to await the further order of the Court herein.

(S.) Henry King, Judge, Criminal District Court
No. 2, Dallas County, Texas.

[fol. 16] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY
TEXAS

COURT'S FURTHER OFFERED CHARGE—Filed February 9, 1951

You are further instructed that any evidence, if any, introduced in this cause with reference to the statements, acts, or conduct, if any, of the Defendant after the commission of the offense of Robbery by the said William Trent Jarrett, if any he committed, as charged in the First and Second Counts of the indictment herein, can only be considered by you, if you consider such evidence, if any, in determining whether or not the Defendant, Thomas

Schwartz, is guilty of the offense charged against him in the First and Second Counts of the indictment herein.

2-9-51 12:10 p. m.

This charge was offered to Defense counsel and they refused same.

(S.) Henry King, Judge.

[File endorsement omitted.]

[fol. 17] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

DEFENDANT'S SPECIAL REQUESTED CHARGE NO. 2 AND ORDER
REFUSING—Filed February 9, 1951

Gentlemen of the Jury:

You are further instructed as a part of the law in this case, that there has been introduced in evidence by the state a certain pearl handled pistol which state witness Bennett testified was given to him by the defendant the day after the Shortal robbery and which said pistol was not used or involved in the Shortal robbery.

You are instructed that this evidence is withdrawn from your consideration and you must not discuss, refer to, or consider same in passing on the guilt or innocence of this defendant.

— — —, Judge.

Refused
Deft. excepts

(S.) Henry King, Judge.

[File endorsement omitted.]

[fol. 18] IN CRIMINAL DISTRICT COURT No. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

DEFENDANT'S OBJECTIONS AND EXCEPTIONS TO THE COURT'S
MAIN CHARGE AND ORDER—Filed February 9, 1951

To the Honorable Judge of Said Court:

Comes now the defendant, and after the State had rested its case and before the main charge was read to the jury and before argument of counsel, and files this, his Objections and Exceptions to the Court's Main Charge:

VI

Defendant further objects and excepts to the Court's main charge because the Court does not charge on the law of circumstantial evidence, there being no direct testimony outside of the accomplices to the commission of the offense as charged in the indictment, and the corroboration relied upon by the State, if any there be, is wholly circumstantial, and this case being one in which an accomplice is charged with an offense and not as a principal, and the State relying on accomplice testimony, the gist of the whole offense depends and relies upon outside testimony which tends to connect the defendant with the commission of the offense, and, as stated above, if any there be, it is wholly circumstantial and entitles this defendant to have a charge on circumstantial evidence.

(S.) Hughes & Monroe, Attorneys for Defendant.

The foregoing objections and exceptions to the Court's main charge were presented in due season.

(S.) Henry King, Judge.

[File endorsement omitted.]

[fol. 19] IN CRIMINAL DISTRICT COURT No. 2, DALLAS COUNTY,
TEXAS.

[Title omitted]

STATE'S MOTION TO DISMISS FIREARMS CHARGE FROM 1ST AND
2ND COUNTS OF INDICTMENT—Filed May 1, 1950

To the Honorable Judge of Said Court:

Now comes the State of Texas by its District Attorney in and for Dallas County, Texas, and with respect moves the Court for an order in the above numbered and styled cause, dismissing and abandoning that part of the first and second counts or paragraphs of the indictment reading as follows: "and then and there by using and exhibiting a firearm, to-wit: a pistol," and the State of Texas by its District Attorney elects to prosecute said cause only on the charges of Accomplice to Robbery by Assault, violence and putting in fear of life or serious bodily injury, contained in said first and second counts or paragraphs of said indictment, and receiving and concealing corporeal personal property over the value of \$50.00, knowing the same to have been stolen, as charged in the third count or paragraph of the indictment.

Will R. Wilson, District Attorney, Dallas County,
Texas, by (S). Wm. B. Henley, Assistant.

[File endorsement omitted.]

[fol. 20] IN CRIMINAL DISTRICT COURT, No. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

ORDER DISMISSING FIREARMS CHARGE FROM 1ST AND 2ND
COUNTS OF INDICTMENT—Filed May 1, 1951

Upon a written Motion of the Criminal District Attorney of Dallas County, Texas, requesting that the following wording, to wit: "And then and there by using and exhibiting a firearm, to wit: a pistol," be dismissed from the

indictment in the first and second counts or paragraphs of the indictment in this cause, the Court hereby orders said wording to be and the said wording is hereby dismissed from the said two (2) counts or paragraphs of said indictment.

(S.) Henry King, Judge.

IN CRIMINAL DISTRICT COURT, No. 2, DALLAS COUNTY, TEXAS
 DEFENDANT'S OBJECTIONS AND EXCEPTIONS TO ORDER DISMISSING FIREARMS CHARGE

To all of which the Defendant in open Court objects and excepts and says that the same is done solely for the purpose of keeping the Defendant from examining the veniremen one at a time as provided by law and to deprive him of fifteen (15) challenges, as provided by law in a capital case, and that the same constitutes an alteration of said indictment and is depriving the Defendant of a right to which he is entitled under the law.

Messrs. Hughes & Monroe, by (S.) T. F. Monroe,
 Attorneys for Defendant.

Noted:

(S.) Henry King, Judge.

[File endorsement omitted.]

[fol. 21] IN CRIMINAL DISTRICT COURT NUMBER 2, DALLAS
 COUNTY, TEXAS

STATE'S MOTION TO DISMISS THIRD COUNT OF INDICTMENT
 AND ORDER GRANTING—Filed May 2, 1950

To the Honorable Judge of Said Court:

Comes now the State of Texas, by and through its Criminal District Attorney in and for Dallas County, Texas, and respectfully moves the court to dismiss the third count or paragraph of the above numbered and styled

indictment in said cause, which contains therein the allegations charging Thomas Schwartz with the offense of Receiving and Concealing Corporeal Personal Property over the value of fifty dollars, knowing the same to have been stolen; and the State of Texas elects to proceed to trial in this cause before the selection of jurors has begun, and prior to an announcement by the said defendant as whether he is ready for trial, on the two counts or paragraphs in said indictment which charge the said Thomas Schwartz with the offense of an accomplice to Robbery by assault, violence and putting in fear of life or serious bodily injury.

Will R. Wilson, Jr., District Attorney, Dallas County, Texas, by (S.) Wm. B. Henley, Assistant.

The above motion granted.

(S.) Henry King, Judge.

[File endorsement omitted.]

[fol. 22] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

DEPENDANT'S OBJECTION TO PLAYING OF PHONOGRAPH RECORD-
INGS AND ORDER OVERRULING—Filed February 8, 1951

To the Honorable Judge of Said Court:

Defendant objects to the testimony of the witness Jarrett and to the playing of phonographic recordings of alleged conversation between the witness Jarrett and the defendant Schwartz for the following reasons:

I

Because the playing of said records of a conversation over the telephone between the witness Jarrett, who was in the County Jail, and the defendant Schwartz is secondary evidence; that the witness Jarrett, who identified the voice of Schwartz, and who will testify that he (the witness Jarrett) called the defendant at the instance and request

of the District Attorney's Office, is now on the witness stand and can testify to the conversation without the playing of the phonograph records; that the witness Jarrett in the absence of the jury, testified that he had one or more conversations with the defendant over the telephone while he was in the County Jail and recited the substance of same, and said testimony can be offered through the witness Jarrett without playing the recordings; that the best evidence of the conversation by and between the defendant and the witness Jarrett would be by allowing the witness to testify in person.

II

Defendant further objects to the allowing of the playing of said records because same is an effort to corroborate the witness' oral testimony by reproducing the conversation on a phonograph; that said recording constitutes a corroboration of the witness Jarrett by his own conversation with the defendant over the telephone.

[fol. 23]

III

Defendant further objects to the admission of said testimony because same is violative of Article 4 of the Constitution of the State of Texas, Section 247.

IV

Defendant further objects to the playing of said recorded conversation because, although the party who originated the telephone conversation, to-wit, the witness Jarrett, has consented to the playing of said record, the receiver of said conversation and a party thereto, the defendant, does not consent to the playing of said record and did not consent to the recording of same and the introduction of said testimony would be violative of Section 605 of the Federal Communications Act.

V

Defendant further objects to the playing of said recording because same constitutes eavesdropping and wire tapping.

VI

Defendant further objects to the playing of said testimony because the record shows that said conversation occurred weeks after said robbery and occurred after the arrest of Jarrett, who was talking from the County Jail at the instance of the officials, and was recorded after all of the fruits of the crime had been recovered and delivered to their owners; and because said conspiracy, if any, had terminated; and further, because the said playing of the recording is highly prejudicial and is no proof of any element of the offense of which this defendant is charged.

VII

Defendant further objects because the conversation between the witness Jarrett and the defendant Schwartz had not been denied and said recording is not introduced for the purpose of impeachment but is tendered as original evidence.

[fol. 24]

VIII

Defendant further objects to said recording because said alleged conversation originating with the witness Jarrett under the direction of the District Attorney constitutes entrapment, and therefore renders any evidence obtained under such circumstances inadmissible.

IX

In support of the above objections, prior to the introduction of same, defendant respectfully calls the Court's attention to the following cases:

Nardone v. U. S., 82 l. ed. 314; 302 U. S., 379; 20 Am. Jur., 1949 Supplement, Section 605, p. 35. Weiss vs. U. S., 308 U. S., 321; 84 l. ed. 298.

(S.) Hughes & Monroe, Attorneys for Defendant.

Overruled—Deft. excepts.

(S.) Henry King, Judge.

[File endorsement omitted.]

[fol. 25] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

DEFENDANT'S FIRST AMENDED MOTION FOR A NEW TRIAL—
Filed March 14, 1951

To the Honorable Judge of said Court:

Comes now the defendant and leave of the Court first had and obtained, and files this, his First Amended Motion for a New Trial.

I

Defendant contends that the evidence in this case is wholly insufficient to sustain the conviction for the following reasons, to-wit: That the defendant Schwartz was charged with being an accomplice by furnishing arms for the purpose of the commission of the robbery prior to said robbery, and that he aided, advised and commanded the said William Trent Jarrett prior to the commission of the robbery to commit said robbery; that there is absolutely no corroboration of the accomplice witness Jarrett and the accomplice witness Bennett to show or to prove that the said William Trent Jarrett was furnished arms or was advised, aided or commanded by the said defendant Schwartz to commit said robbery prior to the commission thereof.

In reference to the second count of the indictment wherein he is charged with furnishing arms, it will be noted that the witness Jarrett testified that the first gun he obtained was purchased for \$12.00 and that the second gun was swapped for the first gun. And in this connection defendant further calls the Court's attention to the fact that the record is wholly lacking in evidence from any source to show that the defendant aided, advised or commanded the said William Trent Jarrett prior to the commission of the offense to robe Mrs. Minnie Shortal. For the total failure of the State to meet the burden imposed [fol. 26] upon it to corroborate the accomplice witness, defendant contends that he is entitled to a new trial.

II

The Court erred in allowing certain phonographic records to be played to the jury, said records being of several alleged conversations between the witness Jarrett and the defendant Schwartz, said conversations being over the telephone, at said time the witness Jarrett being in custody. The above conversations, according to the testimony, occurred when the witness Jarrett was brought out of jail into the Sheriff's Office and there in the presence of the District Attorney and his assistants certain conversations of an incriminatory nature were had with the defendant Schwartz, said conversations being directed by the District Attorney or his assistants.

Defendant further objected to all and every part of said conversations because most of said conversations contained mere statements of fact and self-serving declarations on the part of the said Jarrett which did not call for an answer and said testimony was in effect allowing Jarrett to make a speech to the jury through a recording and assert facts through said records that were not in evidence but which constituted links in the State's chain of prosecution; that same were absolutely self-serving declarations calling for no answers, all of said objections being filed in writing prior to the time that the records were played and prior to the time that the witness Jarrett testified, all of which were overruled by the Court and to which defendant excepted, and the full objection to this testimony and to each part of same will be more fully set out in Defendant's Bill of Exception No. 1.

III

Defendant contends that the learned trial court fell into [fol. 27] error by allowing the State to play these phonographic records to the jury, which were numbered State's Exhibits 4, 5, 6, 7, 8 and 9, and erred in allowing the witness J. E. Sellers to testify to the authenticity of said records, and in allowing the witness Jarrett to testify to the authenticity of same. In this connection, defendant calls to the Court's attention that the objections relied on were not only made orally but were reduced to writing and presented to the Court before the witnesses Jarrett and Sellers

were allowed to testify and before said records were played, said objections being quite voluminous, and the defendant now calls the Court's attention to the written motion to exclude the testimony which is now on file and which was read to the Court and reduced to writing prior to the time that any of the testimony regarding conversations between the witness Jarrett and the defendant Schwartz occurred. Defendant objected because all of this testimony was violative of the constitutional rights of the defendant, and that said phonographic records constituted wire tapping etc. and, as stated, all will be fully set out in Defendant's Bill of Exception No. 1.

IV

Defendant further contends that the Court fell into error by allowing the witness Jarrett to testify that he had an agreement with the defendant Schwartz to "split one-third on all robberies we commit," it being the contention of the defendant at the time that any testimony in reference to "other robberies", was evidence of extraneous crimes and highly prejudicial. To the introduction of said testimony, the defendant in open court then and there excepted, and said conversations will be more fully set out in Defendant's Bill of Exception No. 2.

[fol. 28]

V

Defendant further contends that the Court erred in allowing the witnesses Jarrett and Bennett to testify that several days after the robbery of Mrs. Minnie Shortal that they met the defendant Schwartz on a street known as Greenville Avenue in the City of Dallas and that at that meeting Schwartz had with him a man whom the witnesses testified Schwartz told them "was just some fellow from Philadelphia down here cooling off and that they need not be apprehensive or afraid of him." To all of said testimony the defendant in open court then and there excepted and same will be brought forward in Defendant's Bill of Exception No. 3.

VI

Defendant further contends that the learned trial court again fell into error by failing to allow the witness Hubert

Davis to testify in substance that it was customary for him to fire pistols from the third floor of defendant's pawnshop whenever a question arose as to whether a gun purchased by a customer would or would not shoot. To the failure to allow the witness Hubert Davis to testify that the firing of said pistol was not out of the ordinary and was customary, the defendant in open court then and there excepted, all of which will be more fully set out in Defendant's Bill of Exception No. 4.

VII

Defendant further contends that the Court erred in allowing Miss Kate Graham, a witness for the State, to testify over objection of defendant that she received an anonymous telephone call on the morning of the robbery inquiring as to the whereabouts of Dr. Shortal, and a statement by the said Kate Graham that in the conversation the unknown voice stated that the doctor's wife on a previous date had had an automobile accident but that there was no damage [fol. 29] etc., and that the unknown voice only wanted to talk to the doctor. Defendant objected because the voice was not identified as being that of the defendant Schwartz, although the witness Graham later testified that she had talked over the telephone to Schwartz. Defendant objected because same was incompetent testimony and highly prejudicial, and when same was overruled by the Court the defendant then and there objected and excepted, all of which will be more fully set out in Defendant's Bill of Exception No. 5.

VIII

Defendant further says that the trial court fell into error in refusing to allow the defendant Schwartz to testify to a conversation and understanding that he had with one Fink, a diamond buyer; that it was the contention of the defendant that after the State proved that the diamonds taken from Mrs. Minnie Shortal in the robbery came into the possession of the defendant and that at the time they were returned they were out of their mountings, it then became the right of the defendant to explain where the diamonds had gone, why they were out of their mountings, etc. At the time this objection was raised the Court retired the jury and the defendant narrated to the judge what he would

testify to if allowed to testify. The defendant testified in the absence of the jury, and would have testified before the jury had he been allowed, that it was customary to remove the stones from the mountings in order to weigh same, and that the witness Funk stated that he could not appraise the value of same or weigh same until he took them back to his office in Chicago. To the failure of the Court to allow the defendant to tell the jury his agreement with Fink, why he sent the diamonds to Chicago, why he removed them from the mountings and what he intended to do, the defendant in open court then and there excepted, [fol. 30] and same will be more fully set out in Defendant's Bill of Exception No. 6.

IX

The Court erred in refusing to give Defendant's Special Requested Charge No. 2.

For all of the foregoing reasons, defendant respectfully requests that the verdict of the jury be set aside and that a new trial be granted herein.

Respectfully submitted, (S.) Hughes & Monroe,
Attorneys for Defendant.

[File endorsement omitted.]

[fol. 31] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

• [Title omitted]

STATE'S ANSWER TO DEFENDANT'S AMENDED MOTION FOR NEW
TRIAL—Filed March 19, 1951

To the Honorable Judge of Said Court:

Comes now the State of Texas by and through its Criminal District Attorney in the above styled and numbered cause, and in answer to the Defendant's First Amended Motion for a New Trial filed herein, denies each and every material allegation in the defendant's said motion because the same is insufficient in law and states no proper cause for the granting of a new trial herein.

1

The State denies that the verdict of the jury rendered in the above styled cause is contrary to the law and the evidence and should be set aside and would allege to the Court that the verdict of the jury herein was rendered in accordance with the law and the evidence presented to said jury and that the verdict of said jury should be upheld by the Court.

2

The State denies that certain phonographic records played to the jury were not in accordance with law; these recordings were the actual telephone conversations between the defendant Schwartz and the witness Jarrett, and were in no manner self-serving declarations on the part of the witness Jarrett.

3

The State denies each and every material allegation in Paragraph III of the Defendant's First Amended Motion for a New Trial and specifically denies that said phonographic records constituted wire tapping as set forth in Paragraph III of the Defendant's First Amended Motion for a New Trial as fully presented in the State's attached [fol. 32] Affidavit marked Exhibit "A."

4

The State denies each and every material allegation contained in Paragraph IV of the Defendant's First Amended Motion for a New Trial because the same is insufficient in law and states no proper cause for the granting of a new trial.

5

The State denies each and every material allegation contained in Paragraph V of the Defendant's First Amended Motion for a New Trial because the same is insufficient in law and states no proper cause for the granting of a new trial.

6

The State denies each and every material allegation contained in Paragraph VI of the Defendant's First Amended

Motion for a New Trial because the same is insufficient in law and states no proper cause for the granting of a new trial.

7

The State denies each and every material allegation contained in Paragraph VII of the Defendant's First Amended Motion for a New Trial because the same is insufficient in law and states no proper cause for the granting of a new trial.

8

The State denies each and every material allegation contained in Paragraph VIII of the Defendant's First Amended Motion for a New Trial because the same is insufficient in law and state no proper cause for the granting of a new trial.

9

The State denies each and every material allegation contained in Paragraph IX of the Defendant's First Amended Motion for a New Trial because the same is insufficient in [fol. 33] law and states no proper cause for the granting of a new trial.

Wherefore, premises considered, the State prays that the Defendant's Amended Motion for a New Trial herein be in all things denied.

Henry Wade, District Attorney, Dallas County, Texas, by (S.) Ray L. Stokes, Assistant District Attorney.

Subscribed and Sworn to before me by Ray L. Stokes, an Assistant District Attorney, on this the 19th day of March, A.D. 1951. (S.) Billy G. Burden, Clerk, Criminal District Court, No. 2, Dallas County, Texas. (Seal.)

[File endorsement omitted.]

STATE'S EXHIBIT "A"—AFFIDAVIT OF J. E. SELLERS—Filed
March 19, 1951

STATE OF TEXAS,
County of Dallas.

I, J. E. Sellers, am one and the same person who testified in regard to the State's Exhibit Nos. 4, 5, 6, 7, 8 and 9, in Case No. 7768-A/B, The State of Texas vs. Thomas Schwartz, in the Criminal District Court No. 2, Dallas County, Texas, January Term, 1951. The State's Exhibit Nos. 4, 5, 6, 7, 8 and 9 were recorded by me in the Dallas County Sheriff's Office. These recordings were made by the use of an induction coil connected to a recorder amplifier. The induction coil was held in proximity to the telephone. At the time of the making of these recordings I had ear phones on so that I fully know that these recordings are the true and same recordings as I heard the conversations through my ear phones as the recordings were being made with the telephone wires or any part thereof.
[fol. 34] (S.) J. E. Sellers.

Subscribed and sworn to before me, a Notary Public, by J. E. Sellers, on this the 17th day of March, A. D. 1951. (S.) Bobbie Smith, Notary Public in and for Dallas County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 35] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

ORDER OVERRULING AMENDED MOTION FOR A NEW TRIAL AND
NOTICE OF APPEAL—Filed March 19, 1951

[Title omitted]

This day came on to be heard the amended motion of the Defendant, Thomas Schwartz, to set aside the verdict and judgment herein rendered, and grant him a new trial of this cause; and the State being present in court by her District

Attorney, and the Defendant, Thomas Schwartz, and his counsel, both being present in Court in person, and the Court having heard the said amended motion for a new trial, is of the opinion that same should be refused. It is therefore considered, ordered and adjudged by the court that the said amended motion for a new trial herein be and the same is refused, and in all things overruled. Whereupon the Defendant, Thomas Schwartz, in open court, excepted to such judgment and gave notice of an appeal herein to the Court of Criminal Appeals of the State of Texas, at Austin, Texas, which said notice is here now entered of record.

(S.) Henry King, Judge, Criminal District Court
No. 2, Dallas County, Texas.

[fol. 36] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

ORDER GRANTING AN EXTENSION OF TIME—April 12, 1951.

The time in which to file Bills of Execution in the above entitled and numbered cause is hereby extended to include May 16, 1951.

(S.) Henry King, Judge of said Court.

[File endorsement omitted.]

[fol. 37] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

ORDER GRANTING AN EXTENSION OF TIME—May 16, 1951

The time in which to file Bills of Exception in the above entitled and numbered cause is hereby extended to include May 31, 1951.

(S.) Henry King, Judge of said Court.

[File endorsement omitted.]

[fol 38] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

ORDER GRANTING AN EXTENSION OF TIME—May 31, 1951

Time in which to file Bills of Exceptions in the above entitled and numbered cause is hereby extended to include June 11th, 1951.

(S.) Henry King, Judge.

[File endorsement omitted.]

[fol. 39] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION NO. 1 AND ORDER OVERRULING
SAME—Filed May 29, 1951

Be it remembered that upon the trial of the above styled and numbered cause the following proceedings were had, to-wit:

Several days after the witness William Trent Jarrett had been arrested and charged with the robbery of Mrs. Minnie Shortal, he was escorted to the Sheriff's Office on fifteen or more occasions for the purpose of carrying on recorded telephone conversations with the defendant, Thomas J. Schwartz. At the time of these telephone conversations between the defendant and Jarrett, Jarrett had been formally charged with the robbery of Mrs. Shortal, but the defendant had not been charged or arrested. Jarrett testified that the reason he carried on the recorded conversations for the authorities was to obtain statements from Schwartz which would incriminate Schwartz and furnish evidence for the State, while Schwartz testified that he was talking to Jarrett for the purpose of obtaining information to lead to the arrest of Lester Emmett Bennett, a companion of Jarrett who at that time was still unapprehended. Bennett, who also admitted participating in the robbery with Jarrett, was a State's witness. (S. F. p. 174). Before the recorded con-

versations were admitted, the witness Jarrett testified as follows:

"There were approximately 25 conversations that were recorded. Bennett had not been apprehended at that time. These recordings were my idea to trap Schwartz into some admissions." (S. F. p. 79).

In this connection, the witness J. E. Sellers testified:

"The District Attorney did employ me to make some [fol. 40] recordings of telephone conversations; those were made in the Sheriff's room just behind the Sheriff's Office. I met William Trent Jarrett at that time; I was present there when Jarrett made certain telephone calls to the defendant Thomas Schwartz. I had a recording set up in there, recording what went on (S. F. p. 214) I recorded around a dozen conversations—it might have been as many as fifteen. (S. F. 216). I know the District Attorney, Mr. Wilson; he was in there part of the time; as to which of Mr. Wilson's assistants were in there, I am not certain. At times there were more than three people in there." (S. F. p. 217). These recordings which are known as State's Exhibits Nos. 4, 5, 6, 7, 8, 9, are just six (6) of the twelve or fifteen recordings I made."

At this juncture the State offered the six exhibits in evidence, that is, offered to play the six recordings between the witness Jarrett and the defendant, to all of which the defendant then and there objected and, when said objection was overruled, properly excepted.

The objections assigned by the defendant to the introduction of said recordings were as follows:

"No. 7768-A/B

IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY, TEXAS

"THE STATE OF TEXAS,

VS.

THOMAS SCHARTZ

To the Honorable Judge of said Court:

"Defendant objects to the testimony of the witness Jarrett and to the playing of phonographic recordings of al-

leged conversations between the witness Jarrett and the defendant Schwartz for the following reasons:

I

Because the playing of said records of a conversation over the telephone between the witness Jarrett, who was in the County Jail, and the defendant Schwartz is secondary evidence; that the witness Jarrett, who identified the voice of Schwartz, and who will testify that he (the witness Jarrett) called the defendant at the instance and request of the District Attorney's Office, is now on the witness stand and can testify to the conversations without the playing of the phonograph records; that the witness Jarrett, in the absence of the jury, testified that he had one or more conversations with the defendant over the telephone while he was in the County Jail and recited the substance of same, and said testimony can be offered through the witness Jarrett without playing the recordings; that the best evidence of the conversation by and between the defendant and the witness Jarrett would be by allowing the witness to testify in person.

II

Defendant further objects to the allowing of the playing of said records because same is an effort to corroborate the the witness' oral testimony by reproducing the conversation on a phonograph; that said recording constitutes a corroboration of the witness Jarrett by his own conversation with the defendant over the telephone.

III

Defendant further objects to the admission of said testimony because same is violative of Article 4 of the Constitution of the State of Texas, Section 247.

IV

Defendant further objects to the playing of said recorded conversation because, although the party who originated the telephone conversation, to-wit, the witness Jarrett, had consented to the playing of said record, the receiver of said conversation, and a party thereto, the defendant, does not

consent to the playing of said record and did not consent to the recording of same and the introduction of said testimony would be violative of Section 605 of the Federal Communications Act.

V

Defendant further objects to the playing of said recording because same constitutes eavesdropping and wire tapping.

VI

Defendant further objects to the playing of said testimony because the record shows that said conversation occurred weeks after said robbery and occurred after the arrest of Jarrett, who was talking from the County Jail at the instance of the officials, and was recorded after all of the fruits of the crime had been recovered and delivered to their owners; and because said conspiracy, if any, had terminated; and further, because the said playing of the recording is highly prejudicial, and is no proof of any element of the offense of which this defendant is charged.

VII

Defendant further objects because the conversation between the witness Jarrett and the defendant Schwartz had not been denied and said recording is not introduced for the purpose of impeachment but is tendered as original evidence.

VIII

Defendant further objects to said recording because said alleged conversation originating with the witness Jarrett under the direction of the District Attorney constitutes entrapment, and therefore renders any evidence obtained under such circumstances inadmissible.

IX

In support of the above objections, prior to the introduction of same, defendant respectfully calls the Court's attention to the following cases:

Nardone v. U. S., 82 L. Ed. 314; 302 U. S., 379; 20 Am. Jur. 1949 Supplement, Section 605, p. 35.

Weiss v. U. S., 308 U. S., 321; 84 L. Ed. 298."

[fol. 43] (S.) Hughes & Monroe, Attorneys for Defendant."

"Overruled—Deft. excepts."

Henry King, Judge."

After the objection had been overruled and excepted to, the following phonographic conversation was played to the Jury:

"STATE'S EXHIBIT No. 4

Date—March 18th, 1950 (S. for Schwartz—J. for Jarrett)

S. All right—

J. Tommy?

S. Yes.

J. This is your old friend. Hey, my sister, has she been over yet?

S. No; I haven't seen her.

J. Well, she just flew in today and she has this 'Allen' for an attorney. What kind of a fellow is he?

S. Allen?

J. Yes.

S. Let's see—

J. It is 'Bob', I believe.

S. 'Bob Allen'?

J. 'Bob Allen'.

S. He's all right.

J. Is he all right?

S. Good little lawyer.

J. Well, now, look—I told her to contact you.

S. Yes.

J. And I want to see you as soon as you can get over here because I don't know just what to do, and I am going to the Grand Jury next week, I know, see.

S. Yes; I know that.

[fol. 44] J. And there's a few things that they want to know that I am still holding pat. That's what you want me to, isn't it?

S. Why, certainly; there is no use making any different story.

J. Well, now, look—there's one thing that Fritz told me over there, that when I brought the gun in that—that I paid ten (\$10.00) dollars difference for the gun. Now, they are putting a lot of weight on the gun. Did you tell Fritz that I paid ten (\$10.00) dollars difference for the gun?

S. I told him that there was a little difference; I don't think I said any amount. I said, the first one was no good or something, the man just wanted something for protection; that's the way I put it, to start off with, see.

J. Well, then he says that I took the gun back to you and the way he was talking, why, you told him just everything and he said that you also said that I brought some stuff in there to pawn, etc., and so on.

S. No; will tell you more about that tomorrow, see.

J. Well, now, look, if my sister comes over there—

S. Yes—

J. I hate to send her over there on Elm Street, and I told her to call—

S. Well, there's nobody called me—could have.

J. No; they just left a few minutes ago.

S. Oh.

J. And, so, now if you possibly can get over tomorrow so that I can get my story straight and know what you are saying and what I am to say—

S. Okay, then, I will do that. I was going to come anyway tomorrow, see.

[fol. 45] J. Then, I can depend on you tomorrow because, now, look, I am going to the Grand Jury and I want to prepare myself.

S. Yes; naturally.

J. Because I don't think they have a case unless you, you know, you take the stand.

S. Ain't been nobody been to talk to me, see.

J. Yeh, well, just the way, Fritz was talking to me before, that you had said this and that you had said that and you said something else; and I said, 'If he said that, I don't know anything about it because I don't know anything about it personally; and all I know is what I read in the newspapers', and the papers come out that I confessed to this and confessed to that, and there's other ways that they got Bennett's name except from me. That was through identification I was carrying.

S. Yes, I heard something about that.

J. Well, that was through identification check; addressed to his mother, and the party, they checked my voice, and trying to connect me with the call that was made to this Shortal's you know, checking that, and they checked my voice on that, and my voice—she didn't recognize my voice, and I don't believe that she will recognize Scotty's either. You know that.

S. Well, we will discuss that person-to-person.

J. Well, and so you will be over then?

S. Yeh; I will be over tomorrow.

J. Okay, and, then, what time can I look for you?

S. Oh, I may come right after dinner, see, when church is going on.

J. All right. Now, look if my sister contacts you in the meanwhile, bring her with you when you come.

S. Okay.

[fol. 46] J. If she doesn't, I told her, Elm Street was a pretty bad street etc., and so on; so, if she doesn't contact you, then, you come on over and she will be staying at the Baker, and you can call her or she can call you—get together with her and she has this 'Allen'.

S. Well, she is a pretty good lawyer, but—

J. You think, we could do better?

S. Well, I don't know, better, but she hasn't given him any money, has she?

J. Well, I don't know whether she gave him a retainer fee or not. Well, suppose we talk about that and get all of this straight and know just what I am to say and what you are to say, etc., and so on.

S. Okay; that's right.

J. See you tomorrow, right after dinner.

S. Okay; goodbye."

"STATE'S EXHIBIT No. 5

(Date—March 19th, 1950) (S. for Schwartz—J. for Jarrett)

S. Hello.

J. Tommy?

S. Yes.

J. Are you going to come down tonight?

S. Yes; I got tied up and couldn't get away.

J. Are you going to be able to make it?

S. Well, believe, will make it first thing in the morning; got a few things to see about. Who was that you put on the phone to answer me?

J. Answer you?

S. Who was that you had to ask for me—put on the phone to answer me?

J. Oh, that's a fellow on the Identification Desk; they have to take down all of these numbers and I was hoping [fol. 47] that you could get down this afternoon if at all possible.

S. Well, it wouldn't do any good, I don't think, so, I will make it the first thing in the morning.

J. Well, has anybody contacted you?

S. Not yet.

J. Well, I mean other than my sister?

S. No.

J. Well, 'he' should, most any date.

S. Who is that?

J. Well, you know, 'Scotty'.

S. Oh.

J. I am worried and I would like definitely to see you today, if you can possibly get down.

S. Well, I don't think it will be possible; don't think that it would be advisable for me to come down; that's what I mean. I am trying to dope out something, see.

J. Well, you mean you are afraid to come down?

S. I don't know whether I am or not.

J. Well, now, I don't much suppose that you don't have to, do you, after all?

S. Well, let's hold this off until in the morning; definitely in the morning, before noon, I will be there.

J. Well, now, I can expect you definitely in the morning?

S. Yes; that's right.

J. Well, now look, I will expect you then?

S. That's right.

J. Because I want to know just what to do.

S. You will hear from me in the morning.

J. Okay.

S. Goodbye."

"STATE'S EXHIBIT No. 6"

(Date—March 21st, 1950) (S. for Schwartz—J. for Jarrett)

S. Hello.

[fol. 48] J. Well, he didn't get here.

S. Well, I am going to call him at home and have him to be sure to be there first thing in the morning.

J. Look—

S. He was in court there until 5:00 o'clock.

J. Well, look, Tommy, I am to be questioned again in the morning.

S. By whom?

J. By whom?

S. Yes.

J. Who in the hell haven't I been questioned by? Fritz and his outfit add, now this outfit down here. Look, can he find out definitely before he comes over, anyway at all? Has he got any connections that he can find out definitely if they found the pearl handled gun that you gave 'Scotty'?

S. Oh, I don't know but I will find out. I am going to call him tonight. You won't have a chance to call me again, will you?

J. No; no way in the world.

S. Well; you call me first thing in the morning. You sit tight in that boat and I'll try to see that he helps you.

J. Well, look, see if you can find out about that gun because that is most important. In other words, you don't know whether they located that gun or not? You haven't heard from Fritz or nobody?

S. No; I have been trying to get hold of him all day and I ain't been able to do it.

J. Now, I don't want to be connected with it because I wasn't apprehended with the gun, see, I didn't have nothing.

S. What you don't know, don't know.

[fol. 49] J. Well, it is things like that that I have either got to see you or see this fellow or something.

S. Well, he will be there first thing in the morning and you sit in the boat and we will get along better. There's no use of ten (10) people drowning when one can drown and one can help the other.

J. Oh; that's fine——

S. Just remember that and I guarantee that he will be there in the morning.

J. Well, now, I am going to be able to depend on you?

S. You can depend on that.

J. That will be definitely in the morning?

S. That's right.

J. If it is possible at all to recall tonight, how soon can you get in touch with him and find that out?

S. Well, as soon as I get a chance here to get on the phone.

J. Because I can't run out and use this phone any time like you can over there at the City.

S. I will try to do it pretty quick and, if I can, I will. If not, I'll talk to him anyway and, if you get a chance, you try to call me; if not, I'll have him there in the morning.

J. Look, it is most important if he can find out about this pearl handled "32".

S. Well, I'll do that.

J. And, if you can get in touch with Fritz, find out if he knows where they recovered it. That's the one, you know, he said, wire or send him another gun, where he wanted you to wire him that money, and he said, he had lost it. Now, I don't know whether he has lost it or whether his people have it or what happened to it, and if they take that gun [fol. 50] up there and tie it in with me, why, that's 'Katy Bar the Door.' In other words, I still got a case and I am still going to fight it because, after all, what the papers say, I haven't signed nothing—I haven't said nothing.

S. Well, you sit tight in the boat; let's don't discuss this over the phone; I'll guarantee——

J. Well——

S. —and he'll be there, I guarantee, in the morning. I may try to get him down there tonight.

J. You sure try to do that, if it is possible.

S. Okay, if it is possible.

J. If it is possible—if I possibly can, I'll try to call you.

S. Okay, 'partner'."

"STATE'S EXHIBIT NO. 7

(Date March 19th, 1950) (S. for Schwartz—J. for Jarrett)

S. Hello.

J. Tommy?

S. Yes.

J. Did you contact the lawyer?

S. No; nobody's at home.

J. —got some preaching going on upstairs so I am still—

S. Probably catch him tonight and be there in the morning. I got to go; here comes my old man,

J. Huh?

S. Got to go.

J. Got to leave?

S. Yes.

J. You cannot talk?

S. No, sir; goodbye."

STATE'S EXHIBIT NO. 8

STATE'S EXHIBIT NO. 9 (together)

(Date March 21st, 1950) (S. for Schwartz—J. for Jarrett)

[fol. 51] Voice outside.

J. Thank you. (phone rings)

S. Hello.

J. What's new?

S. Not a thing.

J. No attorney down yet.

S. Well, he said, he was going to come to see you.

J. Well, when can I look for him?

S. Told me last night—that is all I know.

J. Well, it's—I have heard on the grapevine that they are indicting me today. Have you heard anything?

S. Yes; they indicted me, too, with you.

J. Indicted you?

S. Yes; they had me down there all morning.

J. What in hell for?

S. What you told them.

J. What I told them? I haven't told them a damned thing.

S. Well, that's what they say; I can't tell you; I have no way of knowing anything about it.

J. Well, Jesus Christ—did they have the guns there?

S. They didn't show me nothing—if they did—

J. They didn't mention 'guns', then?

S. No.

J. Oh, can you come down here at all?

S. Well, I don't know what good it would do and I asked that lawyer—maybe, when he gets through in that court room, which is almost time, maybe, he will come by and talk to you. I will call his office. I thought he did. I haven't heard from him.

J. Well, just what grounds can they indict you on?

S. I don't know; just what they claim that you said.

J. I haven't told them a damned thing.

S. That ain't what Captain Fritz said, so—

[fol. 52] J. Well, you cannot come down here, yourself?

S. I may do it.

J. I believe, if you would come down here yourself, way this is going—they have got you in one 'hitch' and me in another 'hitch'; and I don't know what you are doing and you don't know what in the hell I am doing; if we get this thing together, maybe, both know what each other is doing.

S. Well, I am going to call and see if that lawyer is in his office and, if not, is in court room, I am going down there and see what—

J. Look, if you would come with him, they would let you come in, wouldn't they?

S. I think so.

J. You wouldn't have no trouble, yourself?

S. I don't think so.

J. Well, in indictment that way—in Grand Jury that way—was I indicted on Robbery?

S. I don't know; they didn't tell me nothing.

J. Don't they have to produce those guns or anything like that?

S. No; they wouldn't show me a thing, anyway.

J. Well, I mean, did they ask you about—you know—if I brought that 'stuff' up to you, etc.?

S. No; they just asked me how I come about the jewelry and all of that.

J. They—I mean, you haven't tied me in in any way at all, have you?

S. No, sir.

J. And you don't know whether I am indicted or—

S. I don't know a thing, yet; probably that way; they confiscated all my books and everything.

J. They did?

(fol. 53) S. Oh, Yes.

J. Hell, they cannot get a damned thing there—I mean, off of your books, can they?

S. No.

J. I mean; you didn't keep record on the guns on those books?

S. No.

J. Hell—damn them. What did they do? The jewelry was all recovered?

S. Oh, yes.

J. Did they offer—I mean—the reward or anything like that? Did that come out?

S. Ain't nobody got anything; if they have, I don't know it. I know, I haven't got anything.

J. Well, Boy, I will tell you, I am just at a loss because I don't know what's going on and, if I could just talk to you face-to-face, I would know just a hell of a lot more.

S. That may take place today; I don't know; I will have to see what—

J. Look, did they say anything at all about 'guns'? See, if they cannot connect me with the gun, they cannot put no armed robbery on me.

S. They may can and may cannot; I don't know—figure, they can or they cannot; I am not trying to run their business; they are trying to run mine. Now, to tell you the truth, I am just a little too scared to try one way or the other; all I know, it didn't do any good for you to go around and do a lot of talking about me because—

J. Look—what good would it do me to talk about you when you told us in the first place, just like you said the other night, when one can sink, there's no use in ten (10) drowning. As we said before, if one can take it, there's no

[fol. 54] use of others going, and that's why 'Scotty' stayed in the car and went in one direction, and I am supposed to meet you, and I got arrested. As long as he is out, I know, I will have help, and I-figure, as long as you are out, I will have help.

S. Well, that's what I thought—when I found out that they knew more about this deal than I did, I couldn't understand that.

J. Okay—well, now, why should I have any reason whatsoever to be putting you in a spot when you should be my help, and I should be looking for money and cigarettes from you and me staying up here without nothing. Why in the hell should I be putting you in a spot.

(Start of State's Exhibit No. 9)

S. Well, I will see what you have to say when they have you over there.

J. Well, will I go over today, yet?

S. No. You will probably have a hearing or something. I don't understand why the Grand Jury called me over there today, anyway. They didn't call me; they came after me.

J. Well, I have a hearing coming up in McBride's Court or some place or other. That was my "thing"—it's out here in the "L.D." Room. A fellow told me but I forgot just what day, but it is a hearing. What does that mean? If they don't have the guns, Tommy, can they or can they not convict me of Armed Robbery?

S. I don't know; I wouldn't want to tell you anything I don't know; I just don't know; that's the way. I have got a lawyer coming to talk to you.

J. Now, I need either him or you and I need to get something together here.

S. Well, I am going to talk to him right away and you will hear about it one way or the other.

[fol. 55] J. If it is at all possible for you to come over—I mean, they will let you come with him, won't they?

S. Well, I just cannot discuss all of that on this phone; you talk too much on this phone, and I don't know what the score may be; it don't seem like you even give a damn; of course, you just want to talk.

J. I don't give a damn?

S. Well, the way it looks like,

J. Well, I am the guy that is going to do time.

S. You were doing time before this, I guess, from the way the paper says; I don't know anything about it. Do you think that, if you were cleared in this case, that you would go free?

J. No; I expect, I would have to go back to Ohio.

S. Well, that's what I thought when I read in the paper; I didn't want to ask anybody because I don't know and it ain't my business to be doing it.

J. Well—

S. —and I will get some information for you. I will talk to that lawyer and see what he is going to do.

J. Okay, then; I will hear from you. Like I say, I cannot be using this phone all of the time.

S. You will hear from me.

J. Okay.

S. Okay.”

NO QUALIFICATION TO BILL OF EXCEPTION No. 1

Insomuch as all six exhibits, that is, recordings, were played continuously, that is, one after another, without interspersing testimony, all of same are set out in this one bill in order to clarify the situation.

To the admissions of said recordings over objection and exception of defendant, defendant here and now tenders this his Bill of Exception No. 1, and asks that same be approved, signed and filed as a part of the record in this cause.

[fol. 56] Which is accordingly done.

(S.) Henry King, Judge.

[fol. 57] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION NO. 2--Filed June 4, 1951

Be it remembered that upon the trial of the above styled and numbered cause the following proceedings were had, to-wit:

The witness Hubert Davis, a witness for the State, testified on direct examination in substance as follows:

That he was a colored porter employed at the Day and Night Pawn Shop by the defendant. That several days before the robbery the defendant Schwartz told him to take the gun upstairs and try it out and see if it would shoot and at that time Jarrett and Bennett were present. The witness further testified that he shot the gun (State's Exhibit No. 2) twice and brought it back downstairs and gave it to Mr. Schwartz. (S.F. p. 81).

In this connection it will be remembered that the witness Jarrett, one of the robbers, testified that on the 14th or 15th of February, several days before the robbery, he went to Schwartz' pawn shop and bought a gun for \$12.00 from Schwartz (State's Exhibit No. 1). The witness Jarrett further testified that he went out in the country to try it out and the firing pin was off center and wouldn't shoot and the next day he went back and told Schwartz about it and told him that he wanted a gun that would shoot. (S.F. p. 20). He further testified that Schwartz told him that he'd give him a gun that would shoot and that was when he sent the colored boy upstairs to try out the "Brevetti" gun. (State's Exhibit No. 2). (S. F. p. 21).

It will further be remembered in this connection that Jarrett testified that he paid no difference for the gun but that when Schwartz gave him the Brevetti gun they dis- [fol. 58] cussed robberies. On the contrary, Schwartz testified that Jarrett paid him \$10.00 difference. (S. F. p. 136).

On cross examination of the witness Hubert Davis, the defendant endeavored to show that it was not unusual for him to have the porter (Hubert Davis) to fire the gun out of the upstairs window; that it was a routine matter and there-

fore was no evidence that the trying out of the gun was evidence that it was to be used in a robbery to kill a victim if necessary. In the endeavor to establish this fact, counsel for the defendant propounded the following question to the witness Davis:

Q. "I will ask you to state if on previous occasions you haven't at the request of either Mr. Schwartz or the buyer of the gun gone upstairs to fire a gun to see if it would shoot."

The District Attorney then objected to the question and same was sustained by the Court, to which the defendant excepted.

The defendant then propounded the following question:

Q. "Do not answer this question until they have time to object and the Court has an opportunity to rule. I will ask you, previous to the time you fired this gun upon the third floor, if you had ever shot any other gun up on the third floor?"

The State then objected and the Court sustained the objection, to which the defendant excepted. The Court then told defense counsel if they wanted any evidence to perfect the bill he would retire the jury, which was accordingly done. In the absence of the jury the Court told the Court reporter to read back the previous question set out above, and after same was read the witness answered:

A. "Yes, I have."

Mr. Hughes: "The next question—Was it a routine matter [fol. 59] in the course of your business there in selling guns—to customers to try the gun out at the request of the customer to determine whether it would fire?"

A. "Yes, sir, we have always done that."

Q. "Had the testing of the guns been made in the same place as this test was made on the gun purchased by Jarrett?"

A. "I have tested them all up there."

Mr. Hughes: "Now, the defendant objects and excepts to the Court's ruling in not allowing the testimony of Hubert Davis in reference to firing the other pistols in the same

place, under the same conditions, because testimony was introduced by the State of a damaging and incriminating matter for the purpose of showing that the gun sold the robber, Jarrett, was fired at the request of the defendant for the purpose of showing the jury that the robber, with the consent of Schwartz and under the direction of Schwartz, wanted to determine whether the gun would shoot to kill in the event that there was any resistance on the part of the parties to be robbed; that the testimony offered negatives this proof and insinuation and innuendo, and the defendant contends that the same is inadmissible for this purpose."

The exception being taken and the bill completed, the jury was brought in.

NO QUALIFICATION TO BILL OF EXCEPTION No. 2

To the refusal of the Court to allow the defendant to make the above proof by the witness Hubert Davis, the defendant in open court excepted, and here and now tenders this his Bill of Exception No. 2, and asks that same be approved, signed and filed as part of the record in this case.

[fol. 60] Which is accordingly done.

(S.) Henry King, Judge.

[File endorsement omitted.]

[fol. 61] IN CRIMINAL DISTRICT COURT No. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION No. 3—EXCERPTS FROM
TESTIMONY OF THOMAS SCHWARTZ—Filed June 8, 1951.

Be it remembered that upon the trial of the above styled and numbered cause the following proceedings were had, to-wit:

While the defendant was testifying in his own behalf he endeavored to explain to the jury why the diamonds taken from the rings of Mrs. Shortal, the prosecutrix, were re-

moved from the mountings and sent to Chicago. To explain the above, counsel for the defendant propounded to defendant the following question:

Q. "What did you tell Fink about it? What deal did you make with this diamond dealer?"

A. "I showed him the diamonds. He looked at them——"

At this juncture the District Attorney objected to anything Fink said. The Court sustained the objection and defendant excepted. The Court then made the following remark:

"I believe I will sustain what Fink said. I think that would be hearsay."

Mr. Hughes of counsel for defendant then told the Court that it (the conversation between Fink and the defendant) was in explanation of the possession of the recent stolen property—to explain the transaction and to show and trace where the diamonds went. The Court then made the following statement:

"Telling what Fink did in person is all right but I still think what Fink said would be hearsay testimony."

Mr. Hughes then told the Court that he wanted to perfect his bill and asked the defendant Schwartz the following question:

Q. "Did you have a conversation with Fink who handled these diamonds?"

A. "I did."

[fol. 62] The Counsel asked this further question:

Q. "What was your agreement and tell the conversation you had with Fink in regard to it?"

The Court sustained the objection and defendant excepted. Defendant then asked the Court if he could state in his bill the reason for asking the questions and what the answers would be. The Court retired the jury and told counsel for the defendant to develop the testimony in the

absence of the jury. Counsel, in absence of the jury, then propounded the following question to the defendant:

Q. "Did you have an agreement and conversation with J. B. Fink of Chicago with reference to the disposition of the diamonds?"

A. "Yes."

Q. "Tell the Court what it was. What did Fink say?"

The Court: "This is to perfect your bill."

Q. "What did Fink agree to?"

A. "He agreed to take them (the diamonds). He suggested that he wanted to take them where he could weigh them and look them over; where he would have time to look at those kind of stones."

Q. "You used the word 'suggested'; did he tell you that it would be necessary for him to take them back to Chicago to his place of business and laboratory and take them out and weigh them?"

A. "Yes, sir."

Q. "Was that what he agreed to do?"

A. "Yes, sir."

Q. "Is that what he told you?"

A. "Yes, sir."

Q. "And following that conversation did you turn the diamonds over to him (Fink) for the purpose that he told you that he wanted them for?"

[fol. 63] A. "That is right."

At this juncture, counsel advised the Court that the above testimony taken in the absence of the jury was what he desired to introduce. The State again objected to the introduction of this testimony. The Court then advised counsel:

"What Fink told him, I still sustain."

Counsel then asked the Court (all of this being in the absence of the jury to perfect his bill):

"May he (the defendant) say without quoting words: 'I was informed that he would do this?'"

The Court: "That would be putting in the conversation,

Mr. Hughes. I just don't think what Fink said would be admissible—hearsay.”

Mr. Hughes: “Your Honor, it is not hearsay to this man (the defendant) when Fink said, ‘Give me the diamonds; I will have to weigh them etc.’ and following the conversation he gave the diamonds to Fink. It is an explanation of recent possession of stolen property and negatives the idea of guilt.”

• This ended the completion of the bill and the jury was then brought back in the court room.

In this connection, it will be remembered that the diamonds were not returned to Mrs. Shortal until March 6, 1950, the robbery having occurred on February 17, 1950, and that when the diamonds were returned they were out of the mountings.

It will further be remembered that the defendant testified that after he had finally located Fink, who had the diamonds, that he instructed Fink to return them immediately and that Fink sent them to him via air mail express from Chicago, and defendant introduced express receipt showing package shipped from Fink to Schwartz dated March 3, 1950—Insured for \$5,000.00 (See Defendant's Exhibit No. 1. S. F. [fol. 64] p. 242.)

To the refusal of the Court to allow the defendant to make the proffered proof, the defendant in open court objected and excepted, and here and now tenders this, his Bill of Exception No. 3, and asks that same be approved, signed and filed as part of the record in this cause.

[fol. 65] COURT'S QUALIFICATION TO BILL OF EXCEPTION NO. 3

Defendant's Bill of Exception, No. 3, is qualified and explained as follows;

The Court certifies that the matters complained of in this Bill of Exception are set out immediately below in question and answer form exactly as it occurred in sequence showing the questions asked, the answers made, objections of the Defendant and the rulings of the Court:

"Q. All right, just tell your conversations with Fink and what you did with the diamonds?

A. Mr. Fink—

Mr. MacNicoll: We object to the conversation with Fink, your Honor.

Mr. Hughes: That's explaining possession of the diamonds with him—why he did it, your Honor.

The Court: Well, what Fink said.

Mr. MacNicoll: Object to what Fink said.

The Court: Sustain it.

Q. What did you tell Fink about it? What deal did you make with this diamond dealer?

A. I showed him the diamonds; he looked at them—

Mr. MacNicoll: We object to what he said, now.

The Court: I believe, I will sustain what Fink said. I think that that would be hearsay.

Mr. Hughes: This is explanation of the possession of the recent stolen property—the transaction—to show and trace where the diamonds were.

Mr. MacNicoll: This is what he is trying to do—tried to sell them—get rid of them—get somebody else to get the money; nothing to do with the explanation of that.

Mr. Hughes: Never mind about that end, the legal proposition [fol. 66] is that we want to show exactly where the diamonds were, in whose possession and show the transaction by conversation and what the contract was.

Mr. MacNicoll: I think that the proper way to do that would be to bring Fink down here; he is a friend of his for 15 years, like Captain Fritz, that witness; it is his friend.

Mr. Hughes: This argument of the facts, a gentleman 56 years old, legal proposition—we will get to those matters.

The Court: Telling what Fink did in person is all right but I still think that what Fink said would be hearsay testimony.

Mr. Hughes: I just want to perfect my Bill. Did you have a conversation with Fink, who handled these diamonds?

A. I did.

Q. Don't answer—it is for the purpose of the record. What was your agreement and tell the conversation that you had with Fink in regard to it?

Mr. MacNicoll: Object to that.

The Court: I believe, I will sustain it.

Mr. Hughes: Note our exception and we may state in our Bill our reasons for it—correct?

The Court: That depends on what you except to. Better retire the jury.

Mr. Hughes: I don't want to worry them.

The Court: I don't either but if you want Bill—

Mr. Hughes: If come up here it will save the jury inconvenience.

Mr. Monroe: They don't need to go up.

Mr. Hughes: Want Reporter; don't want to dictate it out loud.

[fol. 67] The Court: Let the jury go out and let them have Bill; let him go into the record.

Mr. Hughes: Can I do it right over here?

The Court: You cannot do it.

Jury Out.

Mr. Monroe: I hope that we don't have any burglars on there—

Mr. Hughes: Defendant expects to show what will testify to if allowed by the Court.

The Court: Let him tell what testify to. That's why I retired the jury.

Q. Did you have an agreement and conversation with J. B. Fink; Chicago, with reference to the disposition of these diamonds?

A. Yes.

Q. Tell the Court what it was—what was said with reference to it?

A. He was to take them up—

The Court: Wait a minute; we retired the jury to see what Fink said.

Q. What did Fink say?

The Court: To perfect your Bill.

Q. What did Fink agree to do?

A. Agreed to take them—he suggested that he wanted to take them where he could weigh them and look them over, where—have time to look at those kind of stones.

Q. You used the word "suggested"—outside of the jury—did he tell you that it would be necessary for him to take them back to Chicago to his place of business and laboratory, to take them out and weigh them?

A. Well, he was going—

The Court: He just asked question.

A. Yes, sir.

[fol. 68] The Court: Read the question back.

Q. That's what he agreed to do?

A. Yes.

Q. That's what he told you?

A. Yes, sir.

Q. And, following that conversation, did you turn the diamonds over to him for the purpose that he told you that he wanted them for?

A. That's right.

Mr. Hughes: That's the testimony.

The Court: All right; bring the jury in.

Mr. MacNicoll: We object to all of that, what Fink said, your Honor.

The Court: What Fink told him, now, I still sustain.

Mr. Hughes: Can he say, without quoting words, 'I was informed by Fink that he would do this'?

The Court: That would be putting in the conversation, Mr. Hughes. I just don't think that what Fink said would be admissible—hearsay, sir.

Mr. Monroe: Understanding.

The Court: If you can give me some law that shows that it is an exception.

Mr. Monroe: It is an explanation of the diamonds leaving his possession and going to consist of another bona fide transaction, we contend.

Mr. Hughes: We don't care about verbatim language.

The Court: I don't want to deprive you of anything. I don't know of any such Rule that will let that in.

Mr. Hughes: He had a conversation and agreement with Fink and that Fink agreed to do this and do that, describing how he—

Mr. MacNicoll: That is where they need Fink. Let them bring Fink down here.

[fol. 69] Mr. Wade: Have to talk to Fink.

The Court: And to quote it entirely, about the law, same thing, it would be hearsay, my understanding—what Fink would say would be barred under the Rule of Hearsay.

Mr. Hughes: It is not hearsay as to this man; gave it to this man; man said, "Give me diamonds; I will have to weigh them", and, following that conversation, he gave them to him; explanation of recent possession—assumed fact—negatives idea of guilt.

The Court: If you have any law on it, let me have it.

Mr. MacNicoll: We might as well have the jury in; they can hear all of that argument.

Mr. Monroe: We hope they do.

Mr. MacNicoll: I know.

Mr. Hughes: I can show you in Branch's; I don't think that it will take but a minute to find it.

The Court: We will take about a 5 or 10-minute Recess.

Recess: "3:15 P. M. to 3:25 P. M."

Any matter set out in this Bill of Exception contrary to the question and answer testimony set out in this qualification is not certified by the Court as facts.

The Court certifies that during the Recess to examine the law on the point in question, Mr. Hughes, the attorney for the Defendant, stated that all that he cared to prove in this regard was what the Defendant Schwartz understood the agreement to be between the Defendant and Fink, about what Fink was to do with the diamonds. The Court informed Mr. Hughes that, if that was all that he cared to prove, we would look no further into the law and that it would be permitted. After the jury returned into court [fol. 70] the Defendant Schwartz testified as follows:

"I had a conversation with Fink with reference to handling these diamonds; this conversation was the next afternoon after Jarrett and Bennett had turned this jewelry over to me; I talked to Mr. Fink, the diamond dealer, that next afternoon; Mr. Fink was in Texas, then, buying dia-

monds; he was staying at The Texas Hotel, Fort Worth, Texas.

I did turn those diamonds over to Mr. Fink there; we agreed that Mr. Fink would look the diamonds over and see how much they weighed and, in fact, Mr. Fink was going to try to broker them to some other dealers up there; then, Mr. Fink was going to write me a letter and tell me what he could give for them." (Line 8 through 19, Page 141, N S F).

Before the jury retired on the point in question, the Defendant had testified as follows:

"The next morning I got hold of a man by the name of Fink, that was down here, that buys diamonds; he deals in diamonds, so I called him to come over and look at them; Mr. Fink came over and he said, 'I will have to weight them up and everything to tell you what they are worth and take them back to Chicago'; that is where he lives; he was going to look these rings over, then, he was going to send an appraisal of what I could give for them."

In this connection, the appellate court's attention is called to the fact that the Defendant, while the jury was out, testified as to what Fink had told him in this connection, which is as follows:

"Q. What did Fink agree to do?

A. Agreed to fake them—he suggested that he wanted to take them where he could weigh them and look them over, where have time to look at those kind of stones.

Q. You used the word "suggested"—outside of the jury [fol. 71]—did he tell you that it would be necessary for him to take them back to Chicago to his place of business and laboratory, to take them out and weight them?

A. Well, he was going—

The Court: He just asked question.

A. Yes, sir.

The Court: Read the question back:

Q. That's what he agreed to do?

A. Yes.

Q. That's what he told you?

A. Yes, sir.

Q. And following that conversation, did you turn the diamonds over to him for the purpose that he told you that he wanted them for?

A. That's right.

Mr. Hughes: That's the testimony."

In the opinion of the Court, the question and answer testimony set out in the Court's qualification of this Bill of Exception, it is necessary that such testimony be so set out.

With the above qualifications and explanation, Defendant's Bill of Exception, No. 3, is approved, signed and ordered filed as a part of the record in this case.

Henry King, Judge, Criminal District Court, No. 2,
Dallas County, Texas.

[File endorsement omitted.]

[fol. 72] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

DEFENDANT'S BILL OF EXCEPTION NO. 4—EXCERPTS FROM
TESTIMONY OF KATE GRAHAM—Filed June 8, 1951

Be It Remembered that upon the trial of the above styled and numbered cause the following proceedings were had, to-wit:

That Mrs. Kate Graham, a witness for the State, was allowed over objection of the defendant to testify to a telephone conversation she had with an unknown, unidentified person, said conversation being as follows:

"On the morning of the robbery I did receive a telephone conversation from someone concerning an accident to Mrs. Shortal; this call was received about 10:30 o'clock A. M. that morning. The nature of that call was that they wanted to know where they could locate Doctor Shortal, and I told him that Doctor Shortal wasn't in, that he was

at the hospital, and he wanted to know, if they were to come by, could they see Doctor Shortal; I said 'If it is for business, I will help you; if it is professionally, you see Doctor Shortal'; I asked him what he wanted; he said that Mrs. Shortal had backed into him and had bent up his car—dented up his car—and that she had not told him where to go and have it fixed and he wanted to know where to go; I told them that Doctor Shortal could let them have it sometime that afternoon late; he said 'Don't get alarmed; that accident wasn't serious'; I said 'Where was it?'; he said, 'Out on Gaston Avenue'; and I wanted to know his name; I asked him to leave his number and that I would call them; he said, 'I cannot leave a number.' '' (S. F. p. 128)

Prior to the introduction of the above testimony, defendant objected and excepted to same because it was an anonymous [fol. 73] call, the person to whom she was talking being unknown and unidentified, and because same was prejudicial.

In this connection it will be remembered that the witness Miss Graham, who was a sister of Mrs. Minnie Shortal, the prosecutrix, and Secretary to Dr. Shortal, further testified that at a later date, to-wit, the 3rd of March, (the robbery was on February 17th) she received another anonymous telephone call in reference to whether there was a reward for the stolen jewelry, and that at the suggestion of Detective Captain Fritz she phoned the defendant Schwartz back within a few minutes and the voice who asked her about the reward was Tommy Schwartz' voice. The record discloses that on March 2nd, the day before the second telephone call, Captain Fritz had discussed the robbery with Schwartz. It will also be remembered that the voice speaking in the first conversation (the one objected to) was not identified by Miss Graham as the same voice speaking in the second conversation.

For allowing Miss Graham to relate the first conversation with an unknown, unidentified person, the defendant then and there in open court objected and excepted, and here and now tenders this, his Bill of Exception No. 4, and asks that same be approved, signed and filed as a part of the record in this cause.

[fol. 74] COURT'S QUALIFICATION TO BILL OF EXCEPTION No. 4

Defendant's Bill of Exception, No. 4, is explained as follows:

Prior to the testimony of the witness, Mrs. Kate Graham, as set out in this Bill of Exception, the witness, William Trent Jarrett, had testified on direct examination as follows:

"When Bennett and I first walked in there, Schwartz was busy and as soon as he got everything cleared up he said to us, 'I haven't had time to get the complete information yet', and he said, 'I have been busy'; he said, 'It will take me a few minutes and I will have all of the information that you need'; then, Schwartz got the phone book out and a Kriss-Kross Directory; then, he said, 'I want to make one call to see if the Doctor is at the Clinic yet.' Schwartz wanted to make a phone call to Doctor Shortal's Clinic.

The Defendant Schwartz made that call; he got some woman on the telephone and he asked her—he was talking about a Cadillac—Mrs. Shortal's Cadillac had scraped his fender on his car, and he was wanting to get in touch with the Doctor; and she said, 'Well, the Doctor isn't in but if you will leave your number—', and Schwartz hung up the phone. The conversation in question was made from the pawnshop; I was there and I heard what the Defendant Schwartz said.

The Defendant Schwartz would not leave his telephone number; he talked to the lady about an accident or something." (Line 7, Page 27, through Line 1, Page 28, N. S. F.)

With the above explanation, the Defendant's Bill of Exception, No. 4, is approved, signed and order filed as a part of the record in this case.

[fol. 75] Henry King, Judge, Criminal District Court, No. 2, Dallas County, Texas.

[File endorsement omitted.]

[fol. 76] IN THE CRIMINAL DISTRICT COURT No. 2, DALLAS
COUNTY, TEXAS

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION No. 5—COLLOQUY BETWEEN
COURT AND COUNSEL—Filed June 8, 1951

Be It Remembered that upon the trial of the above styled
and numbered cause the following proceedings were had,
to-wit:

The witness Jarrett (one of the robbers), testifying for
the State, was allowed to testify over the objection of the
defendant to a conversation with the defendant Schwartz
in reference to perpetrating other robberies other than the
offense for which the defendant was on trial.

Prior to the introduction of this testimony, the defendant
anticipated what the witness Jarrett would testify and
asked that the jury be retired so that he could make a
motion. In the absence of the jury, counsel for the defense
made the following motion which is quite lengthy, but which
is in substance as follows: The defendant pointed out to the
Court that on two previous trials of this case, both of which
resulted in hung juries, the defendant Jarrett volunteered
certain testimony that prior to the robbery of Mrs. Shortal
that he (Jarrett), Bennett and the defendant had an agree-
ment whereby Jarrett and Bennett were to commit certain
robberies and burglaries and split one-third of the pro-
ceeds; that is, that Jarrett, Bennett and Schwartz were
each to take one-third of the loot. Counsel for defendant
asked the Court to instruct the witness Jarrett not to
testify to any agreement to commit any other robberies or
burglaries and not to volunteer any information along that
line. The court then told counsel that he had indicated that
he would sustain the objection to the general statement that
Schwartz would get something out of all the robberies, but
the Court further told counsel:

[fol. 77] "If they had an agreement up there on any part
of the general agreement that has to do or includes this
robbery is admissible. That is what I had in mind—What
I intend to sustain is not to refer to any other burglary and

refer under no circumstances to the agreement to rob one Fink."

At this juncture, one of the Assistant District Attorneys asked the Court if a general agreement between them would be admissible and then the Court, in the absence of the jury, made the following ruling:

"If they had a general agreement up there when they first met that they were to get a third of all robberies, I say that is admissible because that would include any robbery they committed. In other words, that would show division of the property to this person—that they had, about how it would be divided. You could not just cut him off and say under the agreement they were to get one-third; then you could not even mention robbery; could not say one-third and what or for what, so, where taking agreement, where you cannot separate—extricate it—from the general statement, I think it is properly admissible.

"* * * The Court then continued: "If the man said, general statement, they were going to divide one-third of all robberies, it would certainly include the Shortal robbery; you couldn't get it in any other way. You can have your exception."

The defendant objected and excepted on the grounds that the District Attorney could ask him if they had an agreement about splitting the loot on the Shortal robbery without allowing him to testify that they had an agreement to split on other robberies. At this juncture, the Court ordered the witness Jarrett to re-take the witness stand, he having been retired while the matter was being discussed in court. In the absence of the jury, the witness Jarrett was then [fol. 78] instructed by the Court:

The Court: "Be seated. The counsel for the defendant has made certain requests of the court regarding certain parts of the evidence that was admitted before the jury last time. Jarrett, I want to call your attention to it and instruct you on it so you can abide by it—Something came out that you were to get so much for burglary. Whatever that was that was said about burglaries won't be admissible in this case; you can see that because it is robbery and an agreement that you had to rob Fink—anybody in Fort

Worth, or any other person except the Shortals would not be admissible."

Jarrett: "Yes."

The Court: "You will not testify about it."

The District Attorney then made the following inquiry: "He could go into the general proposition that they were to divide all that they were to get from robberies in general?"

The Court: "Yes, one-third."

Mr. Wade: "All robberies?"

The Court: "Whatever it was."

Mr. Wade: "General agreement, without being stopped?"

Jarrett: "Yes."

The Court: "Without speaking of the robbery, provided that they had no specific understanding about the Shortal robbery."

* * * The Court: "Jarrett, do you mean one-third of all robberies?"

Jarrett: "Yes."

The Court: "That is my understanding."

The District Attorney then made another inquiry: "That was the agreement on the Shortal robbery?"

Jarrett: "Yes."

[fol. 79] The Court: "That is my ruling, that part about other offenses would be admissible; nothing else; no other robberies, attempt to rob or burglary—that is clear, Jarrett?"

Jarrett: "Yes, sir. That's right."

The Court: All right, bring the jury in please."

Whereupon the jury was brought in and in the presence of the jury the witness Jarrett, over the objections and exceptions of defendant, was allowed to testify as follows:

"I got Bennett and we came back into the pawnshop; and, then, we discussed the details of getting the diamonds, that he was wanting us to get, that he had discussed with me the first time.

"Schwartz, Bennett and I had a discussion in there concerning robberies and we three (3) made an agreement as to the distribution of properties taken in robberies. After we had discussed the fine points and got down to splitting

up all or any loot on any of the robberies, he said, 'You go along with me and I will go along with you fellows, and we will split one-third (1/3rd) on any robberies. Lester Emmett Bennett and Schwartz and I were the only three (3) there within hearing distance. (S.F. p. 23, Line 15, through p. 24, Line 2)

In this connection, it will be remembered that the defendant denied that he had ever had any agreement to rob the Shortals.

The defendant objected to all of the above testimony because same was proving extraneous crimes and was a conspiracy to commit other felonies.

To the Court's admission of the above testimony, the defendant in open court then and there objected and excepted, and here now tenders this, his Bill of Exception No. 5, and asks that same be approved, signed and filed as a part of the record in this cause.

[fol. 80] COURT'S QUALIFICATION TO BILL OF EXCEPTION No. 5

Defendant's Bill of Exception, No. 5, is qualified and explained as follows:

The Defendant in this Bill of Exception purports to set out the discussion between The State's Attorney, the Court and Defendant's counsel with reference to the admissibility of an agreement between the Defendant Schwartz, Jarrett and Bennett, with reference to robberies and the split of the properties taken therein.

While the jury was and before the witness Jarrett had testified in this trial, the Defendant's counsel had before him a transcript of the testimony of the witness Jarrett at a previous trial of this case and was making reference to certain matters therein testified to by the witness Jarrett in connection with the robberies.

This Bill of Exception does not set out the complete discussion, neither does it show an exact sequence. That the appellate court may understand exactly what transpired concerning this matter while the jury was out, the Court certifies that the following occurred:

"The Court: Who is your next witness?

Mr. Wade: Mr. Jarrett.

Mr. Hughes: I want to file a motion.

(Discussion at the bench.)

The Court: Let the jury go up for just a minute, please.

Jury out.

(Discussion at the bench with district attorneys.)

The Court: Go ahead and state in your Motion what you want so that I can see what it is.

Mr. Hughes: This is practically the same as in both trials here. Here is the substance of it. It appears on page—wait until the District Attorney gets here—I want him ad-[fol. 81] monished not to ask and the witness not to volunteer in response to questions—not in response to the questions.

The Court: Tell the District Attorney to come in. (Bailiff does so).

Mr. Hughes: On a previous trial that, in substance, I find this is what occurred—this is on the direct testimony, first, of Jarrett, and in this testimony he was asked by Mr. Wilson, 'Did you have any conversation with Schwartz in which —'; he said that he did, and that he and Schwartz and Bennett had a conversation, and the question was: 'I will put it this way, what did you and Bennett—did you and Bennett and Schwartz have an agreement?'; 'Yes'; 'What was the agreement?', and the witness went on to say, 'Well, the agreement was that we would divide our loot on several burglaries', to which we objected; and the Court called us up there and said, 'I will now allow Jarrett to testify but restrict it only to the Shortal matter'; and, then, he went ahead and testifies as to this agreement over our objection. He says, 'We had an agreement to split one-third ($\frac{1}{3}$ rd) on all robberies'; I objected. 'We again object to that on the grounds that it contains extraneous crimes', etc., same objection as previous objection; 'The Court: I sustain it, the last part of that on these robberies; disregard it, gentlemen'. Question, 'That he wanted to get one-third ($\frac{1}{3}$ rd) -?'; we object to the statement whether get one-third ($\frac{1}{3}$ rd), and, 'Was that included in the Shortal Robbery?'; and, 'We object to it now again', because you had already excluded it—only pertaining to the Shortal

Robbery; and, then, he goes ahead and then he goes in there and says that, in our conversation that he wants us to rob a man named Fink in Fort Worth, and I again objected; you told him then not to volunteer anything further and, then, he went on and continuously referred—he asked—not responsive to the question that was asked. Here is another part of it—the same thing—I will read just exactly what it says, ‘Now, in regard to this conversation that you had in reference to robbing the Shortals, I will ask you—’ and, then, it’s a dash—question, ‘Did you have a conversation?’, and, ‘Did you and Schwartz have a conversation at that time?’, and, then, names the exact date; at first it didn’t name it; this was several days before—question, ‘State the substance of that conversation the best that you remember?’, and the Court had already ruled on the matters that we had objected to—answer, ‘Well, we had fluked on that Fort Worth Job that he had for us, and he told us of this—’ and, ‘Judge, just a minute, your Honor, please, that is a matter, etc., you have ruled on’; and we asked you about taking out the question about the job in Fort Worth, and the Court said, ‘Yes; you have just asked about that conversation; matter has been ruled on by the Court; he can say—he wants to know some particular thing about this thing—’ — ‘Mr. Hughes: We ask the court to—this statement just now made by the witness—’; the Court told the jury to disregard that. Now, you had ruled on it twice. ‘Mr. Wilson: I don’t want to go against the Court’s ruling; I want to be careful; I would like to direct my question specifically to this proposition’; ‘The Court: Then, do it’; Question, ‘Now, Jarrett, state the conversation, if any, that transpired between you and Bennett and Schwartz, not with reference to anything else but only with reference, if there was any, to the Shortal Robbery?’; ‘Well, the afternoon we got back from the other place out there—we dropped into the liquor store’; and Bennett continues in the second trial—goes on about it—back up—[fol. 83] second trial tried to stop it again, and in response to this question, kept referring to the other robbery and other plans and particularly about Fink, and he said—that’s on the next page to the one just furnished—and he said—that varies—and, then, they in and, then, he said—a robbery referred to—any of that—now, what I want to

do—I am sure the District Attorney is not going to ask anything in violation of the Court's orders but I want you to tell them—of course, he is under a life sentence already; it don't bother him to be sent back to jail but I do want you to tell him not to volunteer anything about any other transaction, to make no reference to any agreement about any extraneous crime other than this, about any agreement after the robbery of the man in Fort Worth and of Fink—about volunteering some other transaction, and not to volunteer and not to ask him so that we would have to get up and object to robberies and burglaries.

The Court: Any burglary deal—I have indicated that I sustained objection to the general statement that he would get something out of all of the robberies. He has my ruling; I think that's admissible. In other words, if they had an agreement there—if they had an agreement up there on any part of the general agreement that has to do or includes this robbery is admissible, and no agreement that pertains to any—in other words—any other attempted robbery—that's what I had in my mind keeping out—what I intend to sustain now is any other burglary and refer under no circumstances to the robbery of—

Mr. Hughes: Fink.

The Court: —Fink, or any attempted robbery in Fort Worth, or any other robbery—day robbery or any other place.

Mr. Hughes: Will you tell them that he comes on [fol. 84] here—

Mr. MacNicol: General agreement is admissible.

The Court: If they had a general agreement up there when they first met that they were to get a third of all robberies. I say, that's admissible because that would include any robbery they committed. In other words, that would show division of the property to this person can show it otherwise if it is the only agreement—general agreement—that they had about how it would be divided. You could not just cut him off and say under the agreement was set at one-third ($\frac{1}{3}$ rd); you couldn't even mention robberies; couldn't say one-third ($\frac{1}{3}$ rd) and what or for what, so, where taking agreement, where you cannot separate—

extricate it—from the general statement, I think properly—

Mr. Hughes: He said when you referred to that general connection—of course, went on and on; that's just one phase. You said in there that he could testify to the agreement he had with reference to the Shortals.

Mr. Monroe: Censure—

Mr. Hughes: If you will confine it as to getting one-third ($\frac{1}{3}$ rd)?

The Court: Instruct him up here—except that first point. You can have exception.

Mr. Hughes: We will except during time—

The Court: If the man said, general statement, going to divide one-third ($\frac{1}{3}$ rd) of all robberies, it would certainly include the Shortal Robbery; you couldn't get it in any other way, statement to show what the division agreement would be. You can have your exception to it.

Mr. Monroe: Take exception to the asking and the answering of it—

The Court: Then, I will sustain you on the other matters [fol. 85] about any burglaries.

Mr. Hughes: Or anything about Fink—anything about any other specific transaction?

The Court: Fink came up in a little different manner.

Mr. Hughes: Before Fink ever mentioned—

The Court: Latter part of the agreement was—

Mr. Hughes: There was not.

The Court: —about contacting Fink.

Mr. Hughes: That's got nothing to do with this.

The Court: Not have right to testify about this?

Mr. Monroe: We want you to tell that man all about it.

The Court: Bring him in—bring Jarrett in. (Witness Jarrett is brought in) Be seated. The counsel for the Defendant has made certain requests of the court regarding certain parts of the evidence that was admitted before the jury last time; I want to call your attention to it and instruct you on it so that you can abide by it. In questioning you with reference to your meeting with Schwartz—last meeting with Schwartz over there about how the property, or the loot, or whatever it was, was to be divided, he (Hughes) has just read from the book (transcript) there that you answered that the agreement was that you would

divide—make a certain division from all of the robberies and that, later, I believe, that the Shortal Robbery was included in that agreement. In other words, that it would be one-third ($\frac{1}{3}$ rd)?

Jarrett: Yes.

The Court: Whatever it was—you read that—that part I am overruling him on because my opinion is that that is a general statement which would cover the Shortal Robbery as well as any other robbery—a general statement which would include the case on trial. Now, you made the [fol. 86] statements about an agreement to rob a fellow by the name of Fink in Fort Worth, which I ruled was not admissible, and I instruct you now not to mention that in your testimony, about the robbery of Fink, or an attempted robbery of Fink. In other words, I believe the way the record shows the statement, you attempted to rob Fink, that fellow over there in Fort Worth or something?

Jarrett: Yes.

The Court: To be sure that you won't mention it, I am instructing you because I am warning you that it is not admissible—wasn't admissible before—

Jarrett: I don't recall—

The Court: But it got in. Anyway, I am ruling now that it is not admissible, so, if you answer any question, don't refer to any other burglaries—you mentioned something about burglary—

Jarrett: No.

The Court: They read it in the record.

Mr. Hughes: That's in testimony.

Mr. Monroe: It is in the testimony.

The Court: Something came out that you were to get so much for burglary. Whatever that was that was said about burglaries won't be admissible in this case; you can see that because it is robbery, and an agreement that you had to rob Fink—anybody in Fort Worth, or any other person except the Shortals—

Jarrett: Yes.

The Court: You will not testify about.

Mr. Wade: He could go into the general proposition that they were to divide all that they were to get from robberies in general?

The Court: One-third ($\frac{1}{3}$ rd).

Mr. Wade: All robberies.

[fol. 87] The Court: Whatever it was.

Mr. Wade: General agreement, without being stopped?

Jarrett: Yes.

The Court: Without speaking of the robbery, provided that they had no specific understanding about the Shortal Robbery.

Mr. Monroe: He testified—

The Court: As I recall, it don't show.

Mr. Monroe: It does.

Mr. MacNicoll: Included.

Mr. Monroe: —testified to by some other witness. Jarrett said—I think the other witness said different but Jarrett said one-third ($\frac{1}{3}$ rd).

The Court: You took that from the general agreement.

Jarrett: Yes.

The Court: Split one-third ($\frac{1}{3}$ rd) on all robberies?

Jarrett: All robberies.

The Court: Or take it on the proposition of, 'I will give you one-third ($\frac{1}{3}$ rd) of the Shortal diamonds'?

Jarrett: No, sir; on other robberies mentioned before the Shortals, and one-third ($\frac{1}{3}$ rd)—

The Court: One-third ($\frac{1}{3}$ rd) of all robberies?

Jarrett: Yes.

The Court: That is my understanding.

Mr. Wade: That was the agreement on the Shortal Robbery?

Jarrett: Yes.

The Court: That is my ruling, that part about other offenses would be admissible; nothing else; no other robberies, attempt to rob or burglary—that is clear, Jarrett?

Jarrett: Yes, sir; that's right.

The Court: All right; bring the jury in, please, sir.

[fol. 88]

Jury In."

The Court certifies that, after the jury came in, the following questions were asked, answers made and objections

of the Defendants stated and rulings of the Court made as shown immediately below:

“I got Bennett and we came back into the pawnshop; and we were discussing the details of getting the diamonds that he was wanting us to get.

Mr. Monroe: Now, if your Honor, please, that is the very thing.

Q. Now, in that connection——?

The Court: Overrule you.

Mr. Monroe: Note our exception.

Q. The three of you there had a discussion concerning that?

A. Yes.

Q. At that time did you make any agreement between you and Bennett and Schwartz— make any agreements as to the distribution of properties taken in robbery?

A. Yes; we did. After we discussed the fine points and got down to splitting up of any loot on any of the robberies, he said, ‘You go along with me and I will go along with you fellows, and we will split one-third ($\frac{1}{3}$ rd) on all robberies——

Mr. Monroe: Your Honor understands that we object?

The Court: Overrule you.

Mr. Monroe: Exception.

Mr. Hughes: We ask the Court to instruct the jury——
[fol. 89] The Court: Overrule you.

Mr. Hughes: Note our exception.

Mr. Monroe. Separate and distinct offenses.

Q. Who was present at that conversation?

A. Lester Emmett Bennett and Schwartz; we were the only three (3) there, within hearing distance.”

Any matter shown in this Bill of Exception contrary to the question and answer testimony set out in this qualification is not certified to as facts.

According to the testimony of the witness Jarrett, on his

second meeting with the Defendant Schwartz, on Thursday, February 16th, 1950, he, Jarrett and the Defendant Schwartz first had a discussion concerning robberies, and made an agreement as to the distribution of properties taken in robberies and that after discussing the fine points they got down to splitting up all or any loot of the robberies, and that they would split one-third ($\frac{1}{3}$ rd) on all robberies, (Line 19 through Line 25, Page 23, N. S. F.) No mention was made in this discussion, according to the testimony of the witness Jarrett, about any particular robbery, and the Shortal Robbery wasn't even mentioned.

The witness Jarrett testified that the next time he saw this Defendant Schwartz was on the same evening, in the Defendant Schwartz' liquor store, next to his pawnshop; (Lines 15 to 20, Page 24, N. S. F.) and further testified that the first time that the Defendant Schwartz ever mentioned the Shortal Robbery was on the night of February 16th, 1950, about 9:00 o'clock, when they were in the liquor store; and that Defendant Schwartz told Jarrett and Bennett that he had a good one for them the next morning, that he didn't have complete information on it that night but [fol. 90] told them to drop in the next morning and that he would have complete information on Mrs. W. W. Shortal and her jewelry. (Lines 1 to 11, Page 25, N. S. F.)

The Court was of the opinion that the first agreement, according to the testimony of the witness Jarrett, which was a general agreement concerning robberies, without then naming the Shortal Robbery, would be admissible when, at a subsequent meeting, the general agreement developed into a specific robbery, to wit: the Shortal Robbery, according to the testimony of the witness Jarrett. The witness Jarrett testified that the gun, which he used in the Shortal Robbery, was delivered to him during the same visit at which this general agreement was entered into.

In the opinion of the Court, the question and answer testimony set out in the Court's qualification of this Bill of Exception, it is necessary that such testimony be so set out.

With the above qualifications and explanation, Defendant's Bill of Exception, No. 5, is approved, signed and ordered filed as a part of the record in this case.

Henry King, Judge, Criminal District Court, No. 2,
Dallas County, Texas.

[fol. 91] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY,
TEXAS

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION No. 6—Filed June 8, 1951

Be it remembered that upon the trial of the above styled and numbered cause the following proceedings were had, to-wit:

Over the objection and exception of the defendant, William Lester Bennett (one of the robbers), testified for the State as follows:

"At that time, I did have a conversation with the defendant Schwartz about the gun that I was using; Schwartz wanted the '38' that he had loaned me back; I did not have the pistol with me that morning. At that time Schwartz told me that he wanted this '38' gun back, that it was 'hot', that it had been recognized, I, then, told Schwartz that, if he wanted his '38' back, I wanted another gun; Schwartz then asked me if I had any preference; I told him 'No', but if he had any Brevetti I would take that; that's a semi-automatic; and then Schwartz gave me a Brevetti with plastic handles.

"You have shown me what has been marked as State's Exhibit No. 13, which I now identify as the Brevetti that the defendant Schwartz gave me on the morning following the Shortal robbery. I did not give Schwartz the other gun back at that time; I did not have that gun with me at that time; I did not want to carry a gun around town; I had left the other gun in my luggage." (S. F. p. 184, line 15, ending line 6, p. 185.)

Defendant objected to the above testimony on the ground that this transaction in reference to the third gun was irrelevant and immaterial and has no bearing on any issue in the case because, according to the witness, Bennett, this third gun, which was State's Exhibit No. 13, was given to [fol. 92] the witness Bennett by the defendant Schwartz after the robbery of Mrs. Minnie Shortal; and was prejudicial and immaterial because it constituted no proof that

the gun played any part in the robbery, this transaction having taken place after the commission of the crime.

After the Court had allowed the introduction of the above testimony, over the objection and exception of defendant, the defendant in due season requested a special charge in reference to this third gun, being Defendant's Special Requested Charge No. 2, said Special Requested Charge being as follows:

"GENTLEMEN OF THE JURY:"

"You are further instructed as part of the law in this case that there has been introduced in evidence by the State a certain pearl handled pistol which State witness Bennett testified was given to him by the defendant the day after the Shortal robbery and which said pistol was not used or involved in the Shortal robbery.

"You are instructed that this evidence is withdrawn from your consideration and you must not discuss, refer to, or consider same in passing on the guilt or innocence of this defendant."

"Refused."

Deft. excepts.

Henry King, Judge."

The above Special Requested Charge was refused and excepted to by defendant.

For the refusal of the Court to give Defendant's Special Requested Charge No. 2, and for allowing the above testimony to be admitted, defendant here and now tenders this, his Bill of Exception No. 6, and asks that same be approved, signed and filed as a part of the record in this cause.

[fol. 93] COURT'S QUALIFICATION TO BILL OF EXCEPTION No. 6

Defendant's Bill of Exception, No. 6, is qualified and explained as follows:

The Court does not certify as a fact that the Defendant, in objecting to the testimony set out in this Bill of Exception, assigned as one of the grounds that same was preju-

dicial. The Court certifies that the narrative testimony of the witness, Lester Emmett Bennett, set out in this Bill of Exception is shown immediately below in question and answer form, showing questions asked, the answers made, the objections of defense counsel and the rulings of the Court just as they occurred:

“Q. At that time, did you have any conversation about a gun, the gun that you were using?

A. Well, the ‘38’ that he had loaned me, he wanted it back.

Q. Was that the time that you had the conversation?

A. Yes; that morning.

Q. Tell the jury what he said about the ‘38’ that he had loaned you?

Mr. Monroe: He has just said that it was after the offense, any such conversation; that would be immaterial.

Mr. Wade: It is important, your Honor.

The Court: I overrule you.

Mr. Monroe: Immaterial and irrelevant. Note exception.

Q. What did he say about the gun the next day after the robbery? What did he say about that?

A. He told me that he wanted the ‘38’ back, ‘hot’ gun, that it had been recognized.

[fol. 94] Q. What?

A. He said, ‘hot gun’, that the gun had been recognized and that it was hot.

Q. And what did you tell him?

A. I told him that, if he wanted his ‘38’ back, I wanted another gun; he asked me if I had any preference in guns; I told him, ‘No’, that if he had another Brevetti I would take that; that’s semi-automatic; and he gave me a Brevetti with plastic handles.

Q. I show you what has been marked as State’s Exhibit, No. 10, and I will ask you if that (indicating) is the Brevetti that he gave you on the day following the robbery?

(Hands witness)

A. (Witness looks) Yes.

Mr. Hughes: Our objection goes to this; no contention until after robbed Mrs. Shortal.

The Court: Overrule you.

Mr. Hughes: Note exception.

Q. Is that (indicating) the gun that the Defendant Schwartz gave to you on the day following the robbery?

A. Yes; that's (indicating) the Brevetti.

Q. Did you give him the other gun?

A. No, sir; I didn't have it with me at that time. I did not want to carry a gun around town.

Q. Had you left it at your hotel in your luggage?

A. Yes; in my luggage.

Mr. Wade: Well, we offer that (indicating) gun in evidence, your Honor.

The Court: Admit it.

(State's Exhibit, No. 10, Admitted in Evidence.)

[fol. 95] Mr. Wade: State's Exhibit, No. 10, isn't it?

Mr. Hughes: We are objecting to it and the Court overruled us?

The Court: Overruled."

On the subject of the pearl handled pistol, the witness, William Trent Jarrett, testified as follows:

"I have seen that (indicating) gun there before; that is the gun that the Defendant Schwartz gave to Bennett the Saturday after the robbery; I have seen that (indicating) gun in Bennett's possession in his hotel room. (Gun marked State's Exhibit, No. 13, for identification)

(State's Exhibits, Nos. 1, 2 and 3 Admitted in Evidence)

The Defendant Schwartz gave Bennett a 38-revolver, which Bennett threw in the river. On the Saturday that Bennett was down there and talked to him Schwartz was wanting that gun back very badly; Schwartz said that the gun was 'hot' and Schwartz told Bennett to send it back; I was there at the time and I heard that. That (indicating State's Exhibit, No. 13) is the gun that Bennett had; I didn't have that gun. I have seen that gun in Bennett's possession.

Bennett was wanting another gun like the 32-Brevetti

that I had; he didn't exactly care for the 38-revolver that Schwartz had given to Bennett the morning of the robbery. Bennett didn't have that gun with him on that Saturday morning after the robbery and Schwartz gave him this other gun, State's Exhibit, No. 13. Schwartz told Bennett that he would like to get the first gun back, and Schwartz said that he would send the colored boy to the hotel room to pick that gun up but I think that that is the time that Bennett went to Fort Worth and didn't get back over to [fol. 96] Dallas for a day or two; and Bennett, then, went on to Houston; and Bennett took the 38-pistol with him and he also took the 32-Brevetti with him". (Line 11, page 48, through Line 11, Page 49, N. S. F.)

The evidence in this case shows that this plastic handled pistol (State's Exhibit, No. 13) was not used during the Shortal Robbery but, according to the testimony of the witnesses Jarrett and Bennett, was delivered by the Defendant Schwartz to the witness Bennett after the Shortal Robbery, with the understanding that the witness Bennett would return to the Defendant Schwartz the pistol which the Defendant Schwartz had given to the witness Bennett in Defendant Schwartz' pawnshop on the morning of the Shortal Robbery and which pistol was used by the witness Bennett during the Shortal Robbery.

The Court, in passing upon the admissibility of this pearl handled pistol, referred to in Defendant's Special Requested Charge, No. 2, and the evidence relating to said pistol as shown in this Bill of Exemption, at the time said evidence was offered and at the time said Special Charge was refused and in passing upon the Defendant's Motion for a New Trial concerning this matter, was of the opinion, that it was permissible to show the agreement between the witness Bennett and the Defendant Schwartz as to what disposition was to be made of the gun which Bennett testified that he received from the Defendant Schwartz and which was the gun, according to the testimony of the witness Bennett, used by him during the Shortal Robbery. The Court was of the further opinion that this pearl or plastic handled pistol (State's Exhibit, No. 13) was admissible as physical evidence of such an agreement.

In the opinion of the Court, the question and answer

[fol. 97] testimony set out in the Court's qualification of this Bill of Exception, it is necessary that such testimony be so set out.

With the above qualifications and explanation, Defendant's Bill of Exception, No. 6, is approved, signed and ordered filed as a part of the record in this case.

Henry King.

[File endorsement omitted.]

[fol. 98] IN CRIMINAL DISTRICT COURT No. 2, DALLAS COUNTY,
TEXAS

No. 7768-AB

THE STATE OF TEXAS

VS.

THOMAS SCHWARTZ

SENTENCE—March 19, 1951

This Day this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, Thomas Schwartz was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term; and thereupon the said Defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

It Is the Order of the Court, That the said Defendant, who has been adjudged to be guilty of Being an accomplice to the offense of Robbery and whose punishment has been assessed by the verdict of the jury at confinement in the Penitentiary for 99 years, be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said De-

fendant shall be confined in said Penitentiaries, for not less than 5 nor more than 99 years, in accordance with the provisions of the law governing the Penitentiaries of said State; and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

(S.) Henry King, Judge, Criminal District Court
No. 2, Dallas County, Texas!

[fols. 99-102] Clerk's Certificates to foregoing transcript omitted in printing.

[fol. 103]. IN CRIMINAL DISTRICT COURT, No. 2, DALLAS
COUNTY, TEXAS, JANUARY TERM, 1951.

[Title omitted]

Statement of Facts

APPEARANCES:

Hon. Henry Wade, Criminal District Attorney, Dallas County Texas,

Hon. Jimmie MacNicoll, Asst. District Attorney;

Hon. Ray Stokes, Asst. District Attorney,

Hon. Porter K. Johnson, Asst. District Attorney, for the State of Texas.

Messrs, Hughes & Monroe, of Dallas, Texas, by Messrs. Maury Hughes and T. F. Monroe, for the Defendant.

Be it remembered, That, upon this, the 5th day of February, A. D., 1951, the above entitled cause came on to be heard before his Honor, Henry King, Judge of said Criminal District Court, No. 2, Dallas County, Texas, and a Jury; the Rule having been invoked; that the following [fol. 104] is a full, true and correct Statement of Facts, in narrative form; of all the facts adduced upon the trial of the above numbered and entitled cause:

(Reporter's Note: This case was called for trial February 5th, 1951, jury selection completed and testimony started February 7th, 1951; jury sworn; witnesses sworn; the Rule invoked; indictment read; Plea of Not Guilty entered).

MRS. MINNIE SHORTAL, the first witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Wade:

My name is Mrs. Minnie Shortal; I now live at No. 4806 Swiss Avenue, in Dallas, Texas; on February 17th, 1950, I lived at No. 7210 Lakewood Boulevard, Dallas, Dallas County, Texas.

On February 17th, 1950, I left my home that morning about 9:00 or 9:30 o'clock A. M.; I returned home that day at approximately 4:00 o'clock in the afternoon. I [fol. 105] parked my car then in the garage.

The house that I lived in there at that time was a ten (10) room, 2-story, brick house; the garage was in the back, just straight down the drive, at the side of the house.

I entered my house at the back door or the kitchen door.

When I left my house there that morning the yard boy, Jessie Lee Thomas, and my maid, Ellen Williams, were there in my house. When I returned later that day there was somebody else in there; I later learned who they were; I will tell the jury that they were Lester Emmett Bennett and William Trent Jarrett.

When I went into my back kitchen door I went over to the ice box, I opened it and, when I closed the door, I looked up and I saw Bennett coming towards me. Bennett walked into the door and stopped and he said to me, "Get your hands up; this is a hold up," and, then, he drew the gun. That is the first time that I had seen a gun.

This did frighten me. Bennett then asked me where the Doctor (Shortal) was, and I told Bennett that Doctor Shortal was at the office; Doctor Shortal is my husband and he is a physician; his office is at No. 4217-Swiss Avenue, Dallas, Texas. That is not where I live now; we now live at No. 4806-Swiss Avenue.

I then asked Bennett, "What's this all about? I don't [fol. 106] understand it"; Bennett said, "It's a holdup," and, "Just keep your hands up." Then, Bennett said, "Take her upstairs; I am going to see if the Doctor

(Shortal) was with her," and I looked around and there was Jarrett. Jarrett then said, "Get your hands up; don't look at either one of us and go on up the steps"; I went on into the dining room. What he wanted me to go upstairs for, he said, "Go on up and do what I tell you to do and we won't hurt you." I, then, went on upstairs and when I got to the top of the landing, I stopped.

Jarrett had a gun and he had it pointed towards me. At the top of the steps Jarrett said, "Give me your rings"; I gave him my rings and Jarrett said, "Where is the safe?" When Jarrett said for me to give him my rings I had the rings on, one ring on my right hand and two (2) rings on my left hand. One of those rings was a solitaire, about a 7-carat stone in it, with small stones around it; then, I had a wedding band with just small chipped diamonds in it; and the other ring was a large ring that had four (4) large stones in it; two (2) of them were about 4-carats and the others were triangular stones, and I don't know their size. I had these rings on my fingers.

I took my rings off there and I gave them to Jarrett. Jarrett then wanted to know where the safe was; I told Jarrett that there wasn't any safe and, "If there was I would open it so that you would go away and leave me alone." Jarrett said, then, "Get in the closet," so, Jarrett [fol. 107] pushed me in the closet and he shut the door. That closet was upstairs.

I was placed in fear of my life or serious bodily injury as a result of this taking of my rings there. My rings were taken there without my consent and against my permission.

I had never seen either Jarrett or Bennett before in my life.

The next thing that I heard was when Bennett said, "Let's get out; the house boy is loose and gone for the Police." I was in the closet and Bennett was downstairs at that time. The next thing was that Jarrett asked me where my money was; I told Jarrett that I didn't have any money; Jarrett said, "I know that you have some money here"; I said, "All of the money here is in my purse"; Jarrett said, "Where is your purse?"; I then said, "On the table downstairs." Jarrett then called to Bennett and told him to get the money out of the purse on the table downstairs; and

I then heard Bennett say, "Let's get out; the house boy is loose and has gone for the Police"; and I, then, heard them slam the front door, and I knew that they were gone.

Jessie Lee Thomas let me out of that closet; he is my yardman. I did not see either Jarrett or Bennett any more after I got out of that closet there.

All of this happened on the 17th day of February, 1950, in Dallas, Dallas County, Texas; it was on a Friday, the day of the week, I believe.

[fol. 108] I did later recover this jewelry; I got it from Captain Fritz down at the Dallas City Police Department. This (indicating) is my wedding band and it is one of the rings that were taken on that occasion. This other (indicating) ring is ~~not~~ one of my rings that were stolen at that time; I haven't worn the other two (2) rings since that time. I have them; they are at home.

Cross-examination.

By Mr. Hughes:

My home then where this all occurred was at No. 7210 Lakewood Boulevard; that is in East Dallas, isn't it? It is about 2-blocks from White Rock Lake; you go down to the lake at the end of Lakewood Boulevard; it was a ten (10) room, 2-story, brick house. Doctor Shortal and I lived there alone; we have no children.

I came home in my car about 4:00 o'clock in the afternoon; my car was a 1948, "60-Special," Cadillac, maroon in color; maroon is a sort of dark red.

There were three (3) pieces of jewelry that they took off of me there; one of them was the wedding band which I now have on my hand here (indicating); one of the two (2) other rings, as I have said before, was a solitaire, about 7-carats, whose value was about ten thousand (\$10,000.00) dollars. I did not have the other ring on my other hand; [fol. 109] it was on my left hand, the same hand that I had my wedding band on. I would describe that ring briefly as having two (2) stones, about 4-carats each, and the other two (2) stones, as I have just said, were triangular in shaped stones and they were smaller than those were.

One ring of 7-carats and two (2) other rings at 4-carats each would 15-carats, and on the side of this other ring there were two (2) stones of 4-carats each and was a triangular diamond on each side of that. I don't know how large the triangular stones were but they were not as large as the 4-carat stones; they were probably about a carat. I had 17 or 18-carats of diamonds on my hands besides the other diamonds.

I then wore that jewelry most of the time: wherever I would go, shopping or out to lunch with my friends or to a party, wherever it was, I most generally wore all of those diamonds.

My sister is named Miss Graham; at that time she lived on Swiss Avenue; from her residence on Swiss Avenue to my then residence on Lakewood Boulevard is about three (3) miles. I visited my sister on Swiss Avenue quite often.

Bennett did accost me first and, then, either Jarrett or Bennett got me by the arm and told me to go upstairs; that was Jarrett that did that; Jarrett is also the one that inquired about my safe; I told Jarrett that I didn't have a safe in my house, that if I had I would open the safe and [fol. 110] show him where it was, if he wouldn't bother me. We did not have a safe in my home. Jarrett then asked me for my money and I told him, that I didn't have any money or that all of the money was in my purse which was downstairs; Jarrett and Bennett took my money; they said that there was \$22.00 in the purse and that was about right; I didn't have any more money than that.

Re-direct examination.

By Mr. Wade:

My sister lives at No. 4806-Swiss Avenue, the same address where we now live. That is an apartment house; Doctor Shortal and I own that apartment house; we both live in that same apartment house now, No. 4806-Swiss Avenue. We also owned it at the time of the robbery.

Re-cross-examination.

By Mr. Hughes:

Doctor Shortal and I had lived in the house where the robbery occurred since August, 1935, about 15-years; during that 15-years we had never lived in any other place except out there by White Rock Lake; we hadn't lived in any other place and that had been our home there for 15-years and we had had no other residence during that time at any other place.

Re-direct examination.

[fol. 111] By Mr. Wade:

My sister, Miss Graham, moved to No. 4806-Swiss Avenue in 1936 or 1937; we built that apartment house. I spent quite a bit of time at my sister's though.

Re-cross-examination.

By Mr. Hughes:

This apartment building was built before Doctor Shortal and I married; in other words, Doctor Shortal and I didn't build it together; Doctor Shortal built it before he married me. The name of that apartment building is Bellecourt Apartments. My sister lived at the Bellecourt Apartments.

I did not have occasion to know personally whether Jarrett or Bennett, or anybody else, followed me to the Bellecourt Apartments.

(Witness Excused.)

C. E. DEWITT, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Wade:

[fol. 112] My name is C. E. DeWitt; my business is that of an Insurance Adjuster; I have been in that business since

1918. My business primarily consists of handling to completion of an insurance loss; I represent the insurance companies exclusively in the settlement of losses.

I recall the Shortal Robbery on the 17th day of February, 1950. With reference to whether or not I handled some or all of that loss for the insurance companies, I will say that the claim was referred to me by the insurance companies for adjustment. If I recall, this claim was referred to me on the day following the robbery, which would be on the 18th of February, 1950.

Following my receiving this claim on February 18th, 1950, I did receive a telephone call from this Defendant, Tommy Schwartz. I had known Tommy Schwartz for years before that. I can recall that it was around noon on February 22nd that Tommy Schwartz called me up; I think that that is right. I was there in my office at No. 928-Kirby Building.

With reference to the import of that telephone conversation with the Defendant, I will say that Tommy Schwartz called and asked me if I was going to be there for a while, that he wanted to come up and see me; I told him that I would be there all of that afternoon. Tommy Schwartz did come up to my office there somewhere about 2:00 or 3:00 o'clock that afternoon, to No. 928-Kirby Building. I was [fol. 113] there in my private office alone when he came in there; I have five (5) offices there in my suite.

The Tommy Schwartz that I have mentioned here previously is the Defendant in this case; I know him. When Tommy Schwartz first came into my private office there, he asked me if it would be all right to close my door; I told him that it would be all right for him to close the door; Tommy Schwartz then closed the door himself. That left just the two (2) of us there in my private office.

Tommy Schwartz then wanted to know if I was handling the Shortal Jewelry Loss; I told him that I was; Tommy Schwartz then asked me whether there was a Reward offered for the recovery of the jewelry; I told him that there was not, at that time, that I had not received any definite instructions from the insurance company as to the payment of any Reward at all.

Tommy Schwartz asked me the first thing what the Reward was for the recovery of these Shortal Jewels; I asked

him what he had in mind about the Reward; "Well", he said, "According to the newspaper report this jewelry had a value of around forty thousand (\$40,000.00) dollars", and that he thought that he could get the jewelry back for twenty-five (25%) per cent of that.

I told Tommy Schwartz at that time that it was reported to me that the value was fourteen thousand, three hundred (\$14,300.00) dollars. Schwartz didn't say anything when I [fol. 114] told him that. I went on and I told Schwartz that we sometimes paid a Reward when it was merited but that we had never exceeded ten (10%) per cent; Schwartz said that ten (10%) per cent of fourteen thousand, three hundred (\$14,300.00) dollars, which amounted to fourteen hundred and thirty (\$1,430.00) dollars, would not get the job done.

I told Tommy Schwartz that I would be glad to call the insurance company and find out if they would pay that much or more—I believe I said more—it's been quite a while back and I don't remember everything that was said. Schwartz said to me then, "That party is going to call me on the phone at 4:00 o'clock; I have got to give him an answer", and I told him that I couldn't give him an answer then, and Schwartz then said that the fourteen hundred and thirty (\$1,430.00) dollars, if that that was all that he could get, if he could get that much, that he would have to have some cigar money out of the deal. That was this Defendant talking then. Schwartz also said that the other party might think that he was holding out on him to settle for that amount. The best that I can now recall, I think that that was about all that was said there; I don't remember anything else in particular that he said.

I talked to Schwartz there around 2:30 o'clock P.M.—somewhere along in there; Schwartz said that the other party was going to call him at 4:00 o'clock and that that would only give him an hour—it was about 3:00 o'clock then; [fol. 115] he was in the office, I would say, 15 or 20-minutes.

With regard to my record showing that this robbery took place on the 17th of February, 1950, I will say that that was the date on the Loss Report, and it was confirmed by the newspapers and the Police Report. My conversation with Tommy Schwartz took place on February 22nd, 1950, some five (5) days late, or after the Loss. If Tommy Schwartz

said anything further to me as he was leaving my office there it does not register with me now as to what he said.

I asked the Dallas Police Department the next day when I was up there if they were working on the case; I believe that it was the next afternoon that I was up there.

Cross-examination.

By Mr. Hughes:

It has been just about a year ago that this conversation took place or will be in about 2 weeks from now, and I have testified on the two (2) previous trials of this case, and my memory was a little clearer then as to what transpired than it is now.

This Defendant, Tommy Schwartz, did not tell me, having in mind my previous testimony, that he had the Shortal diamonds or knew where the Shortal diamonds were; he did not tell me anything like that.

The Defendant did not tell me that a man had phoned him [fol. 116] and said that he had some large stones and would phone him back that afternoon and that they might be the Shortal diamonds; Schwartz did not make that kind of a statement to me.

With regard to Defendant Schwartz never making any demand on me for any Reward for the Shortal diamonds, I will say that I didn't take it as a demand, more or less; Schwartz never told me that he had the Shortal diamonds; he never told me who had the Shortal diamonds or where the Shortal diamonds were."

Re-direct examination.

By Mr. Wade:

The Defendant Schwartz did not say to me that he could get the Shortal Jewels back. The Defendant Schwartz and I were talking about Mrs. Shortal's diamonds; our talk was limited to the Shortal Jewelry when he came to my office that time.

(Witness excused.)

WILLIAM TRENT JARRETT, the next witness called by the State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

[fol. 117] By Mr. Wade:

My name is William Trent Jarrett; I was born in Logansport, Indiana; I am 35-years old; my birthday is September 9th. I was raised a part of the time in Logansport, Indiana, and then I went to the Moose Home of the Moose Lodge for orphan children; I was 7-years old when I went to the Orphans Home; I was reared in the Moosehart Orphans Home; it is sponsored by the Moose Lodge.

I was 18-years old when I left that Orphans Home; I, then, went to Cincinnati, Ohio, and stayed with an aunt.

On January 1st, 1950, I was in the Cincinnati, Ohio, County Jail; I was being held there as a parole violator on a life sentence. This life sentence was from the State of Kentucky and was for Armed Robbery.

I met there in that jail a man named Lester Emmett Bennett; Bennett and I in a group of ten (10) escaped from that jail on January 7th, 1950; from there we went to Chicago, Illinois, first; I went with Lester Emmett Bennett; when we got to Chicago we went to Davenport, Iowa; and from there we went to Louisville, Kentucky.

I believe that we started down to the Southwest here somewhere around the 11th of January, 1950. We went to Beaumont, Texas, first, and, then, to Houston, and, then, to Brownsville and, then, on into Mexico. The particular reason for going to Houston was to see Bennett's mother who lived there.

[fol. 118] From Houston we went to Brownsville, Texas, and from there over into Mexico. We did come back to Dallas or Fort Worth; we came back to Houston and, then, we came through Dallas going to Fort Worth; this was about February 1st, 2nd or 3rd, 1950; that's right; February 2nd or 3rd, 1950, is when we went to Fort Worth; we came through Dallas and went on to Fort Worth.

Bennett and I stayed in Fort Worth approximately 2-weeks; after we left Fort Worth we came over here to

Dallas; we arrived in Dallas either on the 13th or 14th of February, 1950.

I think that February 17th, 1950, is the date that I committed the Shortal Robbery. I had never lived in Dallas; I had never been in Dallas before that February 13th 1950; I had passed through Dallas.

On either the night of February 13th or 14th, 1950, I got acquainted with a girl here; it was on either the 13th or the 14th; it was the first night that we were here in Dallas. The name of that girl was Wanda Guy; I met Wanda Guy at the Turf Bar, I believe they call it. I was with her that night and I spent most of the next day with her.

I know the Defendant, Thomas Schwartz. When I came to Dallas, I had not known him before that. I believe I first saw the Defendant Schwartz on the afternoon of February 14th or 15th, 1950. It was the day following our first [fol. 119] arrival in Dallas, Texas. We came over to Dallas one evening from Fort Worth—Bennett and I—we spent the night and we moved over here the next day and, then, Wanda and I that afternoon went to the pawnshop; we went down to that Day & Night Pawnshop.

I found out that afternoon who the proprietor of that pawnshop was; I knew it the evening before; Thomas Schwartz was the proprietor of that pawnshop; he is the Defendant in this case. I first went up to see Thomas Schwartz on the afternoon of the 14th or 15th; Wanda Guy was with me. Bennett was not with me then.

I imagine that it was around 4:00 or 4:15 o'clock P. M. when I went up to Schwartz's pawnshop that afternoon, to the Day & Night Pawnshop. With reference to what our first conversation concerned I will say that I purchased a gun from him there for \$12.00, and I believe that Wanda Guy bought a watch for \$15.00; and about the only conversation I had was about the gun and about some diamonds that he was holding for another fellow; that is about all that we talked about.

This (indicating) is a 38-revolver, marked State's Exhibit, No. 1; that (indicating) is the gun that Schwartz sold to me on or about the 14th day of February, 1950, for \$12.00; I do not believe the Defendant sold me any ammunition for this gun; I believe that it was already loaded and that I bought it as it was.

[fol. 120] I imagine that I was in that store that afternoon for a half hour or 35 minutes, somewhere in that neighborhood. Wanda Guy bought a wrist watch in there.

Nothing was said at that time about what this (indicating) gun was for; he just sold me this (indicating) gun; I don't recall any conversation regarding the gun other than that he wrapped it up and, after he wrapped it up, Wanda Guy put in in her purse and carried it out of that place.

The next time that I had an occasion to see the Defendant Schwartz was the next afternoon, sometime after dinner; this (indicating) particular gun would not even fire; I had taken it out in the country to try it out; the firing pin was off center or something, so, Bennett and I drove back down there; and Wanda Guy and I had had a conversation with the Defendant the previous night about the particular diamonds that this particular fellow had; Bennett waited in the car and I went in; it was after dinner sometime, an hour or so after lunch; so, I asked Tommy Schwartz, the Defendant—I told him that this (indicating) gun wouldn't fire and that I would like to get a gun that will shoot; and he said to me, "Well, I have got plenty of them that will shoot in here—plenty of guns here that will shoot"; and we were discussing guns and that is when he brought up the diamonds that he had shown us the night before there.

That afternoon Defendant Schwartz showed me a 32- [fol. 121] caliber Brevetti, Italian make, and while we were talking about the Brevetti he brought up the diamonds; and, then, he told me, "if you had a partner to work with," he said, "You might be able to make a good score"; and, so, that's when I left the gun lying there and went back out to the car and I brought Bennett back with me. Bennett and I were up there in a Buick automobile.

Schwartz didn't do anything with this (indicating) gun while I was present there except he put this (indicating) gun back under the counter there, and, after Bennett came in, he said that he had a Brevetti; and, after we discussed a few of the things that he wanted us to do, he said, "I will give you a gun that will shoot". That is when he sent the colored boy upstairs to try out the Brevetti. It wasn't this (indicating) one; it was the Brevetti.

Bennett was present there when the Brevetti was fired. I introduced Bennett to Schwartz. Two (2) or three (3) colored fellows are about the only other people that I noticed in the Day & Night Pawnshop at that time; there might have been a couple of white customers that came in there but I wouldn't be able to identify them.

We did our talking there, back at the gun counter, right in the corner, at the back of the pawnshop.

I would describe this other gun that Schwartz showed me there as a 32-Brevetti; it has ridged Walnut handles [fol. 122] or wooden grip; it's an automatic.

You have shown me a gun, marked State's Exhibit, No. 2, and a clip of shells, marked State's Exhibit, No. 3, and I will state that the first time that I saw the gun, State's Exhibit, No. 2, (indicating) was either on the afternoon of the 14th or 15th of February, 1950. Well, we were discussing this particular thing that Schwartz wanted us to do and this (indicating) "32" is the gun that he sent up and had fired two (2) shots; I believe that the colored boy fired it; that was a colored boy that worked there. The Defendant told this colored boy to take the gun up there and fire it and, when the colored boy went up, he said, "Now, listen and you will hear it", and I heard two (2) shots, and I took it for granted that it was this (indicating) gun that was fired. The colored boy did not take the gun up on the roof to fire it; he took it upstairs on the second or third floor there.

This colored boy brought the gun back. I know that colored boy now; I have since learned his name; I believe that this name is "Hubert" something—I believe that his last name is Davis—Hubert Davis.

When Hubert Davis came back with that gun, Schwartz filled the clip up and, then, he gave me a hand full of shells; I don't mean a hand full; I mean, four (4) or five (5) extra shells that he handed to me. That (indicating) is the gun right there that Schwartz gave to me; and that (indicating) is the clip that he gave me, I believe; to the best of my knowledge, it is the same one.

Bennett did not go in that pawnshop with me the first time; I don't know where Bennett was at that particular time but I saw him later that afternoon. Bennett was in there with me when I got this (indicating) Brevetti.

The Defendant Schwartz and I were discussing the diamonds that we had talked about the night before and Schwartz told me that, if I had a partner, it would be easy to get diamonds like he showed me the night before; I said, "I have got a partner"; "Oh, is he around here?" I said, "Yes; he is waiting in the car", so, I walked on down the street then; and that was before this (indicating) gun was fired—before Schwartz swapped me this (indicating State's Exhibit, No. 1) gun for this (indicating) gun (State's Exhibit, No. 2); so, I got Bennett and we came back into the pawnshop; and, then, we discussed the details of getting the diamonds that he was wanting us to get, that he had discussed with me the first time.

Schwartz, Bennett and I had a discussion in there concerning robberies and we three (3) made an agreement as to the distribution of properties taken in robberies. After we had discussed the fine points and got down to splitting up all or any loot on any of the robberies, he said, "You go along with me and I will go along with you fellows, and we will split one-third ($\frac{1}{3}$ rd) on any robberies. [fol. 124] Lester Emmett Bennett and Schwartz and I were the only three (3) there within hearing distance.

Lester Emmett Bennett at that time did not have a pistol and I don't know whether it was that time, on that particular occasion, or whether it was the next day, that he gave Bennett the blackjack but, at the time that I received this (indicating State's Exhibit, No. 1) and traded for this one (indicating State Exhibit, No. 2), this (indicating State's Exhibit, No. 1) was the only gun that we had; that one was the only gun that we had of these (indicating) on this day, around the 15th of February, 1950.

Bennett and I were at that time staying out at the Blue Bonnet Motel out on Gaston Avenue; I was registered there as C. A. Lawrence and Bennett was registered as Scott Travis.

I believe the next time that I saw this Defendant Schwartz was the same evening; we had gone to Fort Worth with this (indicating State's Exhibit, No. 2) and we had failed to do what we were supposed to do in Fort Worth and we came back, and I believe that it was in the liquor store right next to the pawnshop that we had our next conversation.

That is the third time that I had talked to Schwartz, in the liquor store right next to the pawnshop; Schwartz operates or did operate that liquor store.

Bennett did get himself a gun; he got it on the morning of the robbery of Mrs. Shortal.

[fol. 125] The first time that the Defendant Schwartz ever mentioned the Shortal Robbery to me was on the night of the 16th of February, 1950, when we were there in the liquor store; I imagine that was around 9:00 o'clock P. M., at night; so, he told Bennett and I, "Well, now, I have got a good one for you in the morning", and he said, "I haven't got complete information on it tonight", but he said, "You drop in the pawnshop in the morning early and I will have complete information on this Mrs. W. W. Shortal and her jewelry". By then I had been in Dallas from either the 13th or 14th of February and that was the 16th of February, 1950—for a few days.

When the Defendant Schwartz mentioned the Shortal Jewelry I had never heard of Doctor Shortal before that.

We discussed the Shortal Robbery thoroughly that night and Schwartz discussed the rings and jewelry that Mrs. Shortal would have, and Schwartz estimated the carats that she would have in diamonds but he told Bennett and I then that he didn't have complete information and for us to drop back in the morning; and that is when Bennett told Schwartz, "Well, now, I will need a gun"; the reason that Bennett wanted a gun was something that had come up in the past; Bennett said, "I will need a gun for this robbery"; Schwartz said, "I will take care of you in a minute."

Schwartz told us that the diamonds would run, approximately, twenty-four (24) carats if we got all of Mrs. [fol. 126] Shortal's diamonds. Schwartz described to us the rings that Mrs. Shortal would have on her fingers; Schwartz said to us that Mrs. Shortal would have three (3) rings; he described for us a large ring, diamond dinner ring, and, then, an engagement ring and I believe that either Bennett or myself—somewhere in there he told us that there was a watch that was diamond studded; Schwartz told us, "Don't fool with the watch because it will be 'numbered'; just get the rings"; and I don't know whether

it was the particular thing where he mentioned the Shortals and her rings or not but the whole total was to be twenty-four (24) carats.

There was something said at that time with specific reference to the division of the loot in the Shortal Robbery; we were to divide it up into "thirds"; he was to handle it and he was to give us the information and he was to handle the jewelry and, then, he would split a "third," each one receiving a "third"—I mean by Schwartz "handling the jewelry" that he was to finance it.

The Defendant Schwartz told Bennett and I that Mr. Fink, over at Fort Worth, was a diamond salesman and handled diamonds; and Schwartz said, "Fink is over in Fort Worth and he will be back in town probably tomorrow"; and Schwartz said, "I will handle the jewelry over the weekend with Mr. Fink". In other words, he was going to sell the jewelry to Mr. Fink and, then, the amount that he received from Mr. Fink, the jewelry salesman, we would [fol. 127] all split three (3) ways, Bennett and I and Schwartz.

As Defendant Schwartz requested us to do, Bennett and I went back there the next morning about 8:00 or 8:15—it was between 8:00 and 8:30 that morning, the morning of February 17th, 1950; that was on a Friday; there was the Defendant Schwartz and Bennett and I there. When Bennett and I first walked in there Schwartz was busy and as soon as he got everything cleared up he said to us, "I haven't had time to get the complete information yet", and he said, "I have been busy"; he said, "It will take me a few minutes and I will have all of the information that you need"; then, Schwartz got the phone book out and a Kriss-Kross Directory; then, he said, "I want to make one call to see if the Doctor is at the Clinic yet". Schwartz wanted to make a phone call to Doctor Shortal's Clinic.

The Defendant Schwartz made that call; he got some woman on the telephone and he asked her—he was talking about a Cadillac—Mrs. Shortal's Cadillac had scraped his fender on his car, and he was wanting to get in touch with the Doctor; and she said, "Well, the Doctor isn't in but if you will leave your number—", and Schwartz hung up the phone. The conversation in question was made from the

pawnshop; I was there and I heard what the Defendant Schwartz said.

The Defendant Schwartz would not leave his telephone number; he talked to the lady about an accident or some-[fol. 128] thing.

We all did go somewhere in the Defendant's car; after Schwartz got this "number" on Lakewood Boulevard, I believe, he said, "I want to make one more check", so, we went out and got in his car. I refer to the location of the Shortal residence out there on Lakewood Boulevard. The Defendant used the telephone book and the Kriss Kross; the Kriss Kross was there in the pawnshop.

Lester Emruett Bennett helped search for the number. The phone rang when Schwartz was going down the Kriss Kross checking and Schwartz answered the phone and Bennett turned back around and went down the phone book and, when Schwartz turned around or hung up the phone, Bennett said, "Is this the place here?" Schwartz said, "Yes; that's it", and turned it back around; and that is when we went upon Swiss Avenue.

At that time we left the pawnshop, crossed the street and we got in the Defendant Schwartz' car and we drove up Swiss Avenue and he pointed the Shortal Clinic out to us. Defendant Schwartz was driving a 1950-Ford then. We passed the Shortal Clinic on Live Oak; I don't know just what block it is, the 4500 or 4600-block; it's on Swiss Avenue. I am not familiar with the streets in Dallas.

When we drove by the Shortal Clinic Defendant Schwartz said that that was Doctor Shortal's Clinic; he said, "They also have an apartment or a whole apartment building", [fol. 129] I believe it was, "A few blocks further up the street"; and we drove up there and he parked and he told Bennett—he said, "Go and check the mail boxes and see if they still have this apartment up here on Swiss". I would say that this was around the 4800-block or the 4700-block, somewhere along in there. Then, Bennett walked into the little hallway and he came back out and he said that there were no Shortals listed there at that address; then, Schwartz said, "Well, she stays here sometimes"; and he next said, "We will see if her car is around in the back"; Schwartz turned the car around, we made a U-turn

and we drove to the next street and tried to look up the alley but we could not see up the alley; Schwartz, then, said, "Let's go on back to the pawnshop now; we will make one more phone call and we will have everything under control"; and, then, we all went back to the pawnshop.

I did say that the Defendant Schwartz gave Bennett another gun; that was when we got back to the pawnshop and, then Bennett said, "I will make the call"; I believe we made the call from somewhere out on Gaston Avenue but it was before we left and, then, Schwartz gave "Scotty", Bennett, this other 38-caliber revolver. You do not have that gun here.

The Defendant Schwartz gave Bennett this 38-caliber gun and some shells to go with it, a round of shells. We, then, left there. Defendant Schwartz told us before we left there in tying anybody up to use this fine cord or picture [fol. 130] frame wire; Schwartz said that it was harder to untie; he said that it would be smaller and tighter.

I imagine that we left the pawnshop then about 9:00 or 9:30 or 9:15 A. M.—between 9:00 and 9:30—the best that I can recall. The Defendant Schwartz did not go with us this time; he stayed there in the pawnshop. Bennett made one call to the Shortal residence and Mrs. Shortal was not at home, and we drove on out there to see what the house looked like and how it was situated and, after we got out there, we parked our car a block and a half from the house, and we walked up the street, and we rang the door bell to the Shortal residence, and the colored boy answered the door, and I asked for Mrs. Shortal; he said, she wasn't at home and that she wouldn't be home until around 3:30 o'clock in the afternoon, and we hemmed and hawed around just a few minutes, looking the situation over, and, then, we left. I imagine that this was around 10:30 o'clock in the morning, the best that I can recall.

We drove on back downtown to the Pawnshop and we walked in and Schwartz was busy at the back counter but, when he saw us walk in, he looked up at us and I shook my head. We had walked in the pawnshop and when Schwartz looked up I shook my head; Schwartz was busy and we couldn't very well carry on a conversation, and I told Schwartz that we hadn't robbed the place, and I shook my

head to let him know that we hadn't robbed it. Schwartz had people in there at that time.

[fol. 131] The Defendant Schwartz did not come over to Bennett and I and talk to us before those people; he waited until those people had dispensed with their business and, then, he called Bennett and I back, and he said to us, "What's the matter? What happened?"; I said, "Mrs. Shortal is not at home", and that we would be calling back; I said, "She won't be home until 3:30 o'clock", and I said, "We will get her at 3:30"; Schwartz said, "Good deal, Jarrett, good deal"; I said, "Okay, we will see you shortly after 3:30", and we left the pawnshop then.

After leaving the pawnshop, I went to a picture show and I don't know just what Bennett did; Bennett did not go with me. I met Bennett later that day out at a drive-in near White Rock Lake; I imagine that I met Bennett there at about 3:15 P. M.

Bennett and I then drove over to the Shortal residence, we parked the same place that we had parked that morning, and we rang the door bell, the colored boy came to the door, and I asked if Mrs. Shortal had gotten home yet; he said, "No"; I said, "We are here", and we waited there for a few minutes and one of us said, could we leave our calling card; he said, "Yes", and, then, he unlocked the screen door and, when he unlocked the screen door, we both walked in.

We told this colored boy to lie down on the floor; he laid down with his face to the floor and we proceeded to tie him [fol. 132] up; we tied this colored boy up. There was somebody else inside of that house then; the colored maid was using the telephone and, when — got off the phone, then, we took the maid upstairs and tied her up on the bed.

Well, it was just about the time that I had completed tying the maid up when Bennett hollered upstairs and told me that Mrs. Shortal was coming; and she had pulled in and she had parked in the garage and came through into the kitchen; I came on downstairs and, as I came down, Bennett had her in the kitchen; and, so, then, I told her to come with me, and I took her upstairs, and, when I got her in front of the closet at the top of the stairs, I asked her for her rings and she gave me her rings, and I put her in the closet.

I took three (3) rings off of her; Mrs. Shortal had a wrist watch on; I did not take that; the reason that I did not take this wrist watch was because Schwartz had told us not to bother with the wrist watch, that it would be "numbered".

About the time that I locked Mrs. Shortal in the closet Bennett hollered up and said, "The colored boy is loose", and he said, "We had better get out of here", so, I ran on down the steps and Bennett and I went out the front door and we walked up to the first block, turned left, got in our car and left—drove off.

We left there, to the best of my knowledge, around 4:00 o'clock, pretty close to it; the best that I can recall.

[fol. 133] When we got in our car we drove right straight over to the Blue Bonnett Motel on Gaston Avenue and our luggage was already packed up; we put our luggage in our car and we drove down there until we turned back up East Grand and on back down to Schwartz's pawnshop. At that time our luggage was still in the car. We did not park in front of the Day & Night Pawnshop; we parked about a block up the street there and we walked down—no; we put the car in a parking lot, right across the street, about a block down.

I imagine that we got down to the Defendant Schwartz's place about 4:30 P. M. From the time that we took these rings off of Mrs. Shortal until they were in Schwartz's possession was long enough for us to drive from out there to downtown and park and take them to him; I imagine that it was, oh, much less than an hour—45 minutes or a half hour.

When Bennett and I first walked into the pawnshop there at that time Schwartz looked up, we began looking in his eye, I nodded affirmatively and we waited at the rear, and, so, he was waiting on somebody, I believe, at the time, and, as the person left in front of the cage, Schwartz was behind the cashier's cage then; I had the Shortal jewelry in my shirt pocket, and I took one ring out and I gave it to Schwartz I believe that I gave Schwartz the solitaire ring first, the 2-stone ring, and Schwartz said, "Hell, is that all?"; I said, "No"; he looked at that ring; I gave him [fol. 134] another ring; he said, "Where is the rest of them?", and, so, I pulled out another ring and gave them

to him; and, then, Schwartz said, "Is that all?"; I said, "Three (3) pieces; the colored boy got loose and we had to leave in a hurry"; so, Schwartz got his jeweler's glass and he started looking at them; and he said, "Well, now, the papers are going to come out and they are going to give this a big blowup"; and Schwartz said to us, "It is going to be rated awfully high. Of course, the papers always exaggerate the value of stolen articles", and, so, I said, "Are you going to take care of this now?"; Schwartz said, "No; Fink will be down here tomorrow"; that was Schwartz; "I will take care of it then; if not tomorrow, it will be Sunday for sure"; and, so I said that I wanted some money. I don't know exactly how much Schwartz gave us at that particular time but I think that it was either \$150.00 or \$200.00, until he had handled the "stuff".

This was right after Bennett and I had given the Defendant Schwartz the rings, some 30 or 40-minutes after the Shortal Robbery. Then, Schwartz told us this, "Go and check in at The Adolphus Hotel or The Baker Hotel", he said, "You will be above suspicion there"; and he said, "Contact me tomorrow"; so, Bennett and I left then, and we were afraid that our car was a little "warm", and that's why we put the car in the Adolphus Garage and checked in at The Adolphus Hotel.

In registering in at The Adolphus Hotel I used the name of C. A. Lawrence and Bennett used the name of Scott [fol. 135] Travis; those are the names that we had used in all conversations since we had been in Dallas. I don't know what time it was when we checked into the hotel; I don't recall; it was before supper though; I recall that.

I did not contact Schwartz until the following Monday but Bennett saw him Saturday, the next day. The Defendant Schwartz gave us \$150.00 or \$200.00; I don't recall; Schwartz gave us money on six (6) or seven (7) different occasions after that while he was stalling us and, supposedly, selling the jewelry and it was so many different times that I don't recall the exact amount that he gave us at any certain times.

I read something about the robbery in the papers. I think that I read it first in the late editions that night

around 10:00 o'clock; it was 10:00 o'clock when I read it that night; there were headlines in the paper.

I checked out of The Adolphus Hotel at 11:20 on Saturday morning, the following morning. I have seen the hotel register since then. I went to Greenville, Texas. I didn't stay with anyone up there; I had a lady friend up there; I visited with her for a while and I stayed at the Jefferson Hotel and the Tip Top Motel, I believe, in Greenville.

The next time that I saw the Defendant Schwartz was the following Monday; I believe that it was shortly after lunch; it must have been around 1:00 or 1:30 P. M.; that would be Monday, February 20th, 1950. Bennett was not [fol. 136] with me at that time. I came back from Greenville to Dallas via Greenville Avenue, and I called Schwartz from a pharmacy way out on Greenville Avenue, and Schwartz said, "We will have a meeting"; he said, "I will be out there in a few minutes"; he said, "In about 20 minutes I will be on out there", but, before I called him—no; I believe that I am wrong there; I believe at that particular time that I called Bennett and Bennett had transferred over to The Baker Hotel, and I called Bennett. Bennett did give me either \$75.00 or \$100.00 that day; I believe that it was \$75.00 that particular time; I met Bennett that day at a pharmacy on Greenville Avenue; I don't know whether it is the Greenville Pharmacy; it is a drugstore way out there on Greenville Avenue.

I don't know now whether I saw the Defendant Schwartz on that Monday or not or whether it was on Wednesday; I saw Schwartz every other day for approximately two (2) weeks here. The next time that I saw this Defendant Schwartz I recall it very well because he brought somebody with him on that day; I believe that it was an Italian boy; Schwartz said that this Italian boy was out of Philadelphia. The reason that I remember that particular occasion is because we were supposed to meet in front of the pharmacy and we waited right in front of the pharmacy and Schwartz pulled up right by the side of us before we knew that he had pulled in there; and that was on Wednesday, and Schwartz had some fellow with him on that day.

[fol. 137] Schwartz did not introduce this Italian boy to us out there that day; this Italian fellow got out of the

car and walked around the corner and, then, when Schwartz saw Bennett and I, this Italian fellow turned and came back and he went in the drugstore there, and Bennett and I got in Schwartz's car there; we said, "Who is that?", and Schwartz said, "One of the boys out of Philadelphia", and Schwartz next said, "He is all right". That is what Schwartz told me; Schwartz said to me, "That boy is all right; he is from Philadelphia; he is all right"; I said, "What is he doing with you?", and Schwartz said, "Oh, he is all right; don't worry about that boy; he is just 'cooling off'".

On that occasion I did get some money off of the Defendant Schwartz; I believe that all that he had with him at that time was \$80.00, and that is the time that he was in a blue Mercury automobile, that particular day. The reason that I recall the date so well was due to Schwartz having this fellow there with him in the car and we were suspicious of this fellow; and, then, when Bennett and I left, instead of backing out and going around the corner, we backed, cut across the sidewalk on the side street so that Schwartz couldn't see the license number on the car.

I believe that that was on Wednesday, February 22nd, 1950. I believe that the next time that I had a meeting with Schwartz was on the following Saturday, the best that [fol. 138] I can recall now; I believe that it was the following Saturday; it was just about every other day.

On the Wednesday following the Monday in question, February 22nd, 1950, in our conversation I asked Schwartz if he had disposed of the jewelry as yet, and he said, "No", that Fink had failed to show up, or something concerning Fink; and Schwartz said, "I am going to send to Chicago and we will just have to sit back, just have to take it easy, until we get an answer", and, so, we just had to agree to that; and I think, then it was on the following Saturday that I contacted him again.

With reference to where the conversation on the following Saturday took place, I will say that I had called down at the pawnshop from out on Greenville Avenue; Schwartz was busy so that he couldn't leave his place of business, and it seemed like that it was a stall to me, so, I got a cab and I came on downtown, and I called him from the White Plaza Hotel; and Schwartz asked me where I was at and I said,

"At the White Plaza Hotel", and that is the time that he told me to get out of the White Plaza, that it was full of cops; Schwartz said that he would meet me down in front of the, I believe Gas Building—the Gas & Electric Building, the Gas Company.

I met Schwartz there; Schwartz told me how to get down there, so, I went down to the Gas Company Building; it must have been about 5 or 10-minutes that Schwartz came [fol. 139] driving up there in a green Cadillac that day. The first time that I had seen the Defendant Schwartz driving an automobile it was a 1950-Ford; the next automobile was a 1950-Cadillac and, then, he was driving a Mercury automobile.

When the Defendant Schwartz drove up there in his Cadillac automobile that day at the Gas Company Building, told me to get in his car; I did and right away then I asked Schwartz what he had done; Schwartz said that he had done nothing, "I haven't received any word"; Schwartz also said—I don't know whether it was that time—that he had heard from Bennett; I believe that it was the next time—that Bennett had called him and told him to wire him money.

Schwartz then drove me over in front of the Mayflower Hotel and we sat there, parked, for just a few minutes, and I said, "Well, do you have any money?"; he said, "Yes", and he pulled out \$50.00, and he said, "I am wiring Bennett \$50.00"; Bennett was in Houston at that time.

With reference to what Schwartz told me at that meeting about the diamonds, I will say that he was sort of "hedging"; Schwartz told me that this man Fink had gone down into either South Texas, or he had gone some place in Texas, and that Fink was due back through in two (2) or three (3) days; and I said, "Well, I thought that you sent the jewelry to Chicago"; Schwartz said, "Well, Fink is in direct connection with Chicago"; and he then said, "I will [fol. 140] get it straight in a day or two and we will square up". This conversation with the Defendant Schwartz was there in front of this Mayfair Hotel up there.

On that occasion there the Defendant Schwartz gave me \$35.00; he also said that he was going to wire Bennett \$50.00 as soon as he got to a telephone. Schwartz said that he was going to wire the money to Scott Travis.

At the Adolphus Hotel Bennett and I used the names of Scott Travis and F. S. Tartar; I used the name of F. S. Tartar—"Captain" F. S. Tartar; Bennett used the name of "Major" Scott Travis at the Adolphus Hotel on Saturday following the robbery.

I was staying in Greenville most of this time and I telephoned Bennett from Mrs. Aleen Miller's house in Greenville, I think that I telephoned Bennett the first time following the robbery on that Monday following the robbery from Mrs. Miller's house, and I believe that I put in two (2) or three (3) telephone calls; I was trying to locate Bennett and I couldn't do that, and I, then, called Schwartz, and that is when Schwartz told me that he had had a wire from Bennett, and I believe that Bennett had gone back over to Fort Worth for a day or two (2), and, then, I came down here and I believe that is the time that I brought Mrs. Miller with me and that is the time that Bennett had this lady friend of his in her car.

The next time that I came over here and I saw the [fol. 141] Defendant Schwartz and talked to him about this jewelry after the Saturday following then was either on Monday or a Wednesday, the best that I can recall; I then talked to Schwartz about the jewelry; I asked him what he was going to do and it was the same "stall" all over again; Schwartz said, "Well, I have not been able to see Fink yet but I am going to get it straight and, as soon as I get it straight", he said, "We will split it", and then is when he discussed with me a few other things that he was wanting me to do in the meantime; this was not with reference to the Shortal jewelry.

I next saw Bennett on the evening of March 3rd; I was arrested for this on March 4th. With reference to my having any further conversations with the Defendant Schwartz about money and about the jewelry before March 3rd; just like I have said before, about every other day I went to the liquor store or I called him, and then every time that I saw him, which was about five (5) or six (6) times—I don't recall the number of times that I did see Schwartz after the robbery—and it was always in regard to jewelry, if he had disposed of it yet and what he was going to do with it.

After I gave this jewelry to this Defendant Thomas Schwartz I never did see any of it again before I was arrested.

The last time that I met Schwartz I did have a conversation with him about my going by the pawnshop and picking up \$50.00; that was just before I went on down to Houston; [fol. 142] that date is bound to have been either the 1st of March or the 2nd of March. I called Schwartz and he met me at the Gas Company Building; Schwartz was driving this Ford that day; and, so, he said, "I haven't got any money on me", and he said, "I have got a little business to do right up the street and I will park some place down there"; I don't recall what street he parked on, and there was a liquor store there; I told him that I wanted \$50.00; Schwartz said to me there, "Bennett called and wants me to wire him some more money", and we were walking or sitting there then; and, so he walked down the street; I was sitting in the car; he went on down the street and he walked into this place and came back and said that he couldn't get the money from that fellow, that he wouldn't loan him the money; Schwartz then said that he didn't have time; he next said, "Wait just a minute while I make a telephone call", so, he went in somebody's office there and made a phone call and he came on out and he said, "Well, now, you catch a cab up here on the far corner and go up by the pawnshop"; and he said, "Hubert will give you \$50.00"; and, then, I walked up the street and I had to go over to The Baker Hotel to get a cab; I waited there for a while until I could get a taxicab and, then, I drove up by the pawnshop; I got out and I told the driver to wait and I looked in the store window; and Hubert stuck his head out so as to know who was in the cab, he waved his hand, and he walked back in the pawnshop, and he came out with [fol. 143] an envelope and he handed me the envelope, and I told the driver to drive me back to The Baker Hotel; so, I put that money in my pocket—I judged that it was money; I didn't look at it then; then, I got another cab after I got back to The Baker Hotel—I got out at the Baker Hotel and, then, I went back over to the Mayfair Hotel where my car was parked at a parking lot about 2-blocks down the street at a big parking lot.

I, then, left for Houston, Texas; I drove my car to Houston; I saw Bennett around 11:00 o'clock that night in Houston; we came back to Dallas on March 4th, arriving here at about 9:00 o'clock in the morning. I called Schwartz just as soon as I got in the City Limits; we had been calling for Schwartz the night before from The Rice Hotel in Houston and it was his mother that answered the phone and we never did get him on the phone Friday night.

When Bennett and I arrived back in Dallas on March 4th we started calling Schwartz just as soon as we got in the City Limits but we couldn't contact him; we were calling him at the Day & Night Pawnshop; Schwartz was not there and we couldn't contact him; whoever was there wouldn't answer the phone. Bennett and I came on into Dallas and I called, oh, I guess, ten (10), twelve (12) or thirteen (13) times that morning; and, so, then, we decided that we would go by the pawnshop and see if Schwartz was in there hiding out, refusing to answer calls or wasn't taking any conversation; so, we pulled over in that street, one over from Elm Street, and we parked our car and I walked up by the pawnshop and I looked in; I couldn't see Schwartz; Schwartz's car was there but Schwartz wasn't; so, we started watching to see if Schwartz would come out and get in his car; a young fellow came out and got in the Defendant Schwartz's car.

I, then, walked back down the street and got in our car and we were sitting in the car, we looked up and there the Defendant Schwartz was walking up the street; this was the next street over from Commerce; would that be Commerce?; I am not familiar with the streets; it was one street over from Elm Street.

When we saw the Defendant Schwartz there he was walking towards us and Bennett and I both ducked down behind the car so that Schwartz couldn't see us and, as Schwartz walked by our car, I got out and Schwartz cut through a little side street that goes through there, about a half block from the pawnshop; it comes out into Elm Street; I caught up with the Defendant Schwartz about half way to the store, in that block, and I hollered at Schwartz, and he turned around; I yelled at Schwartz.

I told Schwartz, "Wait a minute, Tommy"; Schwartz turned around; I walked up to him, and Schwartz said to

me, "Hell, get away from me; I am 'hot'; I have just gotten [fol. 145] out of jail"; I said to him, "Well, now, Tommy, what is it all about?"; Schwartz said, "I have just got out of jail; they have had me down in the jail all night"; I said, "How about our money now?"; and he said, "No; I haven't; it's cost me five thousand (\$5,000.00) dollars to get out of jail"; and Schwartz said, "You are yelling about money"; and Schwartz said, "You are going to get the money"; Schwartz said, "Get away from me; call me later; you call me later this afternoon and we will get it all straight; you get away from me"; I got away from him then and went back to the car and, so, we drove away from there out towards White Rock and, then, it must have been around 3:00 o'clock that I started calling him again. I mean 3:00 o'clock that afternoon.

I called the Defendant Schwartz first from a drugstore and, then, from a filling station, from just any pay phone; I got hold of Schwartz two (2) or three (3) times and he said, "Call me back in 15-minutes"; the last time that I got him on the phone it must have been a little bit before 4:00 o'clock P. M., and Schwartz said, "All right, where are you?"; I said, "We will meet you at Live Oak and Haskell at 4:15"; Schwartz said, "Okay, partner; I will be there at 4:15". That was at the corner of Live Oak and Haskell. Schwartz said to me, "Okay, partner, I will be there in 15-minutes"; it was about 4:00 o'clock when I called him.

Bennett and I drove on back to the corner of Live Oak [fol. 146] and Haskell; we weren't calling from there; and we parked our car alongside of the Clinic or hospital out there, and I went down there and stood across the street, watching the front of the drugstore where we were supposed to meet him; and I watched there for about 5-minutes, and I thought that we had, perhaps, made a mistake; and when I crossed the street and I went down past the drugstore there and I turned and started back across Live Oak and that is when Captain Fritz and his men arrested me, at the corner of Live Oak and Haskell.

Bennett was sitting in the car at that time; he was not arrested; Bennett then took off when he saw me getting arrested. The Defendant Schwartz didn't even "show"; he never did show up out there.

I was then put in jail. I did have further contacts with Schwartz; I spent 13 days at the City Jail and, then, I was transferred to the County Jail; and I believe that it was the following Saturday after I was put in the County Jail that I called Schwartz from the Jail Office, the little office behind the Sheriff's Office, downstairs in the jail. There were six (6) or seven (7) conversations on the telephone from there, and I believe that I first called Schwartz at the pawnshop and, then, in the evening, I called him at the liquor store, and on Sunday I believe that I called him once at his home or tried to at his home.

I will tell this jury that I knew that these telephone conversations were being recorded. I have since that time heard those conversations played back from the recordings. The recordings were made in that little office right behind the Sheriff's Office; I was in there and I could see it being recorded as the telephone was sitting on the "pickup". I have later had occasion to hear all of these recordings played back and the recordings are exactly what transpired in those telephone conversations. After I heard these recordings played back, I marked each one of them with my initials.

(State's Exhibits, Nos. 4, 5, 6, 7, 8, 9 and 10, marked for identification at this time) Those (indicating) are my initials on State's Exhibit, No. 4; this (indicating) stamp was put on there in my presence.

Those are my initials (indicating) on State's Exhibit, No. 5, and that (indicating) stamp was put on there in my presence.

Those are my initials also (indicating) on State's Exhibit, No. 6; I was present and heard it played back before I initialled it; they pasted the label on them there.

Those (indicating) are my initials on State's Exhibit, No. 7; that was put on there after I had heard them played back, in my presence.

I identify those (indicating) as my initials there on State's Exhibit, No. 8; those were put on there after I had heard it played back to me, in my presence.

[fol. 148] After I had heard it played back to me, I put my initials (indicating) on this State's Exhibit, No. 9; that was done in my presence.

On all of the records that were played back and the records that I have heard played back since they were recorded, I will tell the jury that those records correctly reflect the conversations that I had with the Defendant Schwartz over the telephone from the County Jail down here. All of the records correctly reflect that. I have heard all of them played back.

I have seen that (indicating) gun there before; that is the gun that the Defendant Schwartz gave to Bennett the Saturday after the robbery; I have seen that (indicating) gun in Bennett's possession in his hotel room. (Gun marked State's Exhibit, No. 13, for identification).

(State's Exhibits, Nos. 1, 2 and 3, Admitted in Evidence.)

The Defendant Schwartz gave Bennett a 38-revolver, which Bennett threw in the river. On the Saturday that Bennett was down there and talked to him Schwartz was wanting that gun back very badly; Schwartz said that the gun was "hot" and Schwartz told Bennett to send it back; I was there at the time and I heard that. That (Indicating State's Exhibit, No. 13) is the gun that Bennett had; I didn't have that gun. I have seen that gun in Bennett's possession.

Bennett was wanting another gun like the 32-Brevetti [fol. 149] that I had; he didn't exactly care for the 38-revolver that Schwartz had given to Bennett the morning of the robbery. Bennett didn't have that gun with him on that Saturday morning after the robbery and Schwartz gave him this other gun, State's Exhibit, No. 13. Schwartz told Bennett that he would like to get the first gun back, and Schwartz said that he would send the colored boy to the hotel room to pick that gun up but I think that that is the time that Bennett went to Fort Worth and didn't get back over to Dallas for a day or so; and Bennett, then, went on to Houston; and Bennett took the 38-pistol with him and he also took the 32-Brevetti with him.

Cross-examination.

By Mr. Hughes:

I did say that I was 35-years of age; I have not been in constant trouble and I have not testified many times in

courts; that's wrong. I do have it in for the Defendant, Tommy Schwartz. I believe that it was Schwartz that had me arrested. Schwartz is not the one that told me to go out on Live Oak and Haskell, the place where I was arrested, and meet him there; Schwartz did tell me that he would meet me out there after I got hold of him at the store, and, instead of the Defendant Schwartz being there, the Officers were there. There is no question in my mind about when I was arrested, around 4:30 o'clock P. M. on March 4th, 1950.

[fol. 150] I was charged in 1935, 16-years ago, with house-breaking, in Cincinnati, Ohio, in Cause No. 304-428; the date of April 19th, 1935, could be the correct date.

It is right that, in South Bend, Indiana, under the name of Trent Jarrett, No. 4,315, on April 23rd, 1936, I was arrested and charged with being a Fugitive from Grand Larceny, and turned over to the authorities on April 27th, 1936, at Aurora, Illinois.

It is wrong that, on December 4th, 1936, under the name of Trent Jarrett, No. 1,600, I was charged with Tampering with an automobile and fined and given 30-days in jail. I deny that.

You said Aurora, Illinois, but it was in Cincinnati, Ohio, under the name of Barney Jarrett, No. 5,597, that I was charged with Tampering with an Automobile and fined and given the 30-days. You have that right now.

It is correct that on April 27th, 1936, No. 1,600, I was charged with Larceny in Aurora, Illinois, moving on down.

It is right that in 1937, in Cincinnati, Ohio, under the name of William Barney Jarrett, No. 58,861, date of June 11th, 1937, I was convicted of Conversion of Personal Property, or Theft by Conversion, and fined \$102.00 and given three (3) months in jail.

It is correct that, on December 16th, 1937, at Barbourville, Kentucky, under the name of Barney Jarrett, No. 414, I was [fol. 151] arrested and charged with Robbery.

It is also right that, on December 16th, 1937, under the name of Barney Jarrett, No. 3,097, I was charged with being a Fugitive from Armed Robbery and transferred to Knox County, Kentucky.

It is wrong that, on January 12th, 1938, in Detroit, Michigan, under No. 56,611, I was arrested for Armed

Robbery and for being a Fugitive and that, on January 15th, 1938, for that offense I was turned out of the jail there and taken back to Kentucky because the last three (3) cases that you asked about all pertain to the same charge; all three (3) of them are correct except that I was not arrested in Detroit, Michigan, charged with Armed Robbery.

It is right that, on March 3rd, 1938, at LaGrange, Kentucky, No. 28,865, I was charged with Armed Robbery and given a Life Sentence. I served from March, 1938, to December 13th, 1946, when I was paroled from this Life Sentence for Armed Robbery.

That is wrong that, after being paroled, I was arrested in Dayton, Ohio, under the name of William Trent Jarrett, No. 21,524-9005, under date of April 28th, 1947, for Burglary and Entry.

It is right that, on September 9th, 1947, I was returned to the Penitentiary at Eddyville, Kentucky—on September 28th, 1947, for Violation of Parole. I did not escape from [fol. 152] that penitentiary. Prior to September 9th, 1947, I did escape from the jail at Barbourville, Knox County, Kentucky, that time.

My parole was reinstated on April 6th, 1949, three (3) years later.

It is right that, on October 27th, 1949, in Cincinnati, Ohio, I was arrested and charged with possession of a gun, a felony—Armed Robbery and Burglary. I don't recall the date of my last arrest in Cincinnati, Ohio; I believe that it was around in the latter part of 1949, before Christmas. I escaped from the Cincinnati, Ohio, Jail that time. I did saw out of the Cincinnati, Ohio, jail but you are confused about that sheet there.

I believe that I sawed out of the Cincinnati, Ohio, Jail on January 7th, 1950. Lester Emmett Berlett, my partner, who is also here in the Dallas County Jail, came out of that hole in that jail with me there.

After we sawed out of that Cincinnati, Ohio, Jail we went to Chicago, Illinois. When I broke out of that jail I was wearing suit of clothes, shirt and a topcoat; Bennett and I wore our jail clothes out. I had been in that jail three (3) months about. I had on the same suit that I had worn in that jail all of that time but we had dry cleaning

and a laundry in there and people could bring in fresh clothes. We did not change clothes before we sawed out; [fol. 153] we went out in our shirts; we, then, went to Chicago, Illinois.

I imagine that we stayed there about two (2) days; we next went to Davenport, Iowa, and we stayed there about two (2) days; after we left there we went to Louisville, Kentucky, and we stayed there for about two (2) days; we left there and we went to Beaumont, Texas; we, then, went to Houston, Texas; after we left Houston, Texas, we went to Brownsville, Texas; from Brownsville we went into Mexico; we returned to Brownsville from Mexico; from Brownsville we went back to Houston; from Houston we returned to Brownsville; from Brownsville we went into Mexico; from Mexico we returned to Brownsville; we stopped in another town overnight enroute back from Brownsville to Houston.

During all of these trips around the country and into Mexico neither Bennett or I had a pistol; we had never met the Defendant Schwartz then; I say that this man Bennett and I travelled all over this country without a pistol. I had handled a pistol on one or two occasions before I met Schwartz. I do tell the jury that we didn't have any pistols on this trip to all of these different places that we went to.

I don't remember the name of the place that I went to from Brownsville. We came through Dallas and went on to Fort Worth; when we drove through Dallas to Fort Worth we were in a Buick car; we did not have any pistols. I believe that it was in February when we got to Fort Worth; [fol. 154] I don't believe that we got to Fort Worth in January; I wouldn't swear to the date that we arrived over there; I do not know the exact date that we got to Fort Worth.

Bennett and I stayed over there in Fort Worth for, approximately, 2-weeks. I believe I testified previously that I just loafed during the time that I was in Fort Worth; I did loaf there in Fort Worth for approximately 2-weeks.

During the time that Bennett and I were in Fort Worth and I was loafing, for about 2-weeks, the date of which I don't remember exactly, I don't believe that we made any

trips over to Dallas. Bennett and I did have a car at that time; we had a Buick automobile. During the whole time that we were in Fort Worth and had this Buick automobile and I was loafing I don't believe that Bennett and I drove over to Dallas during that period, no.

I do not know where the Ben Milam-Schoolhouse is in Dallas; neither do I know where the P. Freeland's Restaurant is on Annex Street here. I again say that, as far as I know, during our stay in Fort Worth we did not drive over to Dallas.

Bennett and I came to Dallas to live on either February 13th or 14th, 1950. When I first came over here I met a woman in some bar or restaurant over here; I did tell this jury that this woman or lady that I met in this eating place, or bar, or cafe, was named "Miss" or "Mrs." Wanda Guy—G-u-y; that is correct; that I made an acquaintance with [fol. 155] her and that I took her to my hotel; that was the first night that we came over to Dallas; I also told them that the next morning we got up and went back to Fort Worth; I came back to Dallas and met Wanda Guy again that afternoon, the same afternoon; it was the afternoon of the same morning that I went to Fort Worth.

I moved my clothes over here and, after we saw the Defendant Schwartz, we got a place to stay over here. We did not move to Dallas until after we had talked to Schwartz; our belongings were in the car. When I bought that (indicating) pistol from the Defendant Schwartz I was not living in Dallas; I had no permanent address here. The day that I saw Schwartz we had our clothes in the car; we were not living in the car.

When I was previously asked the question, "Where were you living at the time that you bought that pistol?", I may have answered, "I was living in Dallas", Mr. Hughes, but I will confess this, that a lot of times a person doesn't know how to answer your questions. I did move to the Blue Bonnet Motel the night after I talked to the Defendant Schwartz. In regard to where we were living when we moved to Dallas, I will say that we were living at the Blue Bonnet Motel; that is the first place that we moved to after we came to Dallas; I moved out there the night after I met Schwartz.

We were living at a private residence here at the time that I bought the pistol there (indicating); if that transcript there shows that I testified at a previous trial that, [fol. 156] at the time that I bought the pistol, I was living in a private residence here in Dallas, I undoubtedly did so testify. I did testify to that before but we were not "living" there. On a previous trial I was asked, "At the time that you went in there and bought this pistol (indicating) for \$12.00 and Wanda Guy bought a wrist watch for \$15.00, were you living at the Motel?"; and I answered, "At the time that I bought the pistol, then living in a private residence"; and, "In Dallas or Fort Worth?"; "Yes; in Dallas; that's right; I was living in Dallas at the time that I bought that pistol"; then, you asked, "Living here at the time you bought that?", and I answered, "In a private residence"; you asked me, "A private residence? One of Wanda Guy's friends", and I answered, "One of Wanda Guy's friends; yes"; then, you asked me, "Where is that located?", and I answered, "I had rather not say". I did so testify to that.

If I stayed one night with a girl it would not be right to tell the address; I was with Wanda Guy in this private residence; I do say that I stayed at a house of one of Wanda Guy's friends; I spent one night there and practically all of the next day; I believe that that was either on the 13th or 14th.

I left from that private residence and we went down there to see the Defendant Schwartz; we, then, moved to the Blue Bonnett Motel; I believe that it is on Gaston Avenue. I imagine that that is out in the vicinity of the Shortals. I [fol. 157] imagine that it is a couple of miles from the Blue Bonnet Motel to the Shortal residence. I did state that we went from the Blue-Bonnet Motel over to the Shortal residence after we saw the Defendant Schwartz.

With reference to Schwartz showing Bennett and I where Doctor Shortal lived; I will say that he showed us where one of their apartment building was. Tommy Schwartz did show Bennett and I in the phone book where Doctor Shortal lived; Tommy Schwartz did not drive Bennett and I out there and show us where Doctor Shortal lived.

After I had spent the night with Wanda Guy, I got up

the next morning and I went to Fort Worth, I came back and I met Wanda Guy again at this private residence, a home. I did not tell Wanda Guy at that time that I would like to buy some kind of a cheap gun for protection; those are two (2) questions when you asked me did I tell her or not; I told Wanda Guy that I wanted to purchase a gun; I didn't tell her what kind or what for; that is what I mean by "two (2) questions".

I did not tell Wanda Guy and the other people out there and at other places around town that I came in contact with that I was an Army Officer; that's wrong; I did not pose as an Army Officer around a lot of other people; I did register that way on the hotel register. I believe that I did tell Wanda Guy that I was an Officer in the United States Army, that I had just gotten out of the Army and that I was stationed at Chanute Field, or something like that.

Bennett was with me a part of the time that I was staying out at this private residence; I did testify at the other trial that Bennett was staying with another party at another place; he was a part of the time; I really wouldn't know where this other place was that Bennett stayed in.

Wanda Guy did tell me that at one time, years ago, when she was a girl, she had known Tommy Schwartz and had gone to the same school with him and that he was then a pawnbroker; that is when we went to Defendant's pawnshop; Wanda Guy and I got in a car or we walked and she showed me where Tommy Schwartz's pawnshop was and took me up there. That was either March 13th or 14th; it was not 2-weeks before March 13th; it couldn't have been.

We went in this pawnshop and it was quite a large establishment; I told Tommy Schwartz that I wanted to see a pistol; that is wrong; I did not tell Schwartz that I wanted a cheap pistol for protection, that I had just moved here; Schwartz did show me a pistol, a little cheap pistol, and sold it to me for \$12.00; I did buy this (indicating) pistol from Tommy Schwartz for \$12.00. There was nothing said about any "Shortals" when I bought this (indicating) gun; there was nothing said about any robbery when I bought this (indicating) pistol; this (indicating State's Exhibit, No. 1) pistol, didn't have anything to do with the [fol. 159] Shortals except that it was traded for this (indi-

eating State's Exhibit, No. 2) gun here. I did not carry this (indicating State's Exhibit, No. 1) gun out there to rob the Shortals; I carried this (indicating State's Exhibit, No. 2) gun out there.

Wanda Guy did go up to the Defendant's pawnshop with me; Wanda Guy did say that she would like to buy a little watch; Schwartz did not show Wanda Guy a watch that he wanted \$15.00 for; I believe that it is wrong that Wanda Guy told Schwartz there, the pawnbroker who handles watches, that she didn't have but \$10.00 and that I said, "Wanda, I will put in the other \$5.00", and that Wanda Guy bought the watch for \$15.00; Wanda Guy did get a watch in there; I did not give Wanda Guy one penny to pay on the watch.

I never heard Tommy Schwartz say to me in there at that time, "This is a cheap gun for \$12.00; I don't even know whether it will shoot", and I did not tell him that I didn't care whether it would or not, that I just wanted to keep it around the house. I did not ask Tommy Schwartz whether the gun would shoot or not; I took it for granted that it would shoot when I bought it; I, then, took it out in the country to determine whether it would shoot or not. I believe that Bennett went out in the country with me at that time; I there tried to see if the gun would shoot and the gun would not shoot.

I took the gun back to Tommy Schwartz the next afternoon and I told him that I wanted another gun, and [fol. 160] Schwartz did not tell me that, if I wanted a better gun, it would cost me money; that's wrong; that is not true; it is wrong that I swapped on this (indicating State's Exhibit, No. 2) gun and that I paid him a difference for that better gun.

It is also not true that after that I took Schwartz an overnight square case, which has been exhibited here in this court room before, and hock it to him for \$10.00 and told him that I had no use for it.

I absolutely did not take a moving picture projector two (2) or three (3) days after that in to him there and soak it to him for \$40.00 and told Schwartz that I didn't have any place to keep it at my home.

When Bennett went in there to Schwartz's pawnshop

a few days after I had had this first transaction he did not tell Schwartz that he was a Major, or had been a Major in the Air Corps—Major Scott Travis of the United States Air Corps—and that he had been discharged, absolutely not. Bennett did not go by that name to Schwartz; Schwartz never knew our names, then, absolutely not; Schwartz never knew our aliases.

Bennett absolutely did not tell Schwartz that he had been in the Army, that he and his wife had separated, that she had filed a suit for a divorce and that he had some diamonds belonging to his wife and wanted to know if Schwartz would be interested in buying them.

With reference to Schwartz telling me that he had a job [fol. 151] for me with reference to robbing Mrs. Shortal, I will say that that was the third one, I believe. The Defendant Schwartz did proposition me about robbing Mrs. Shortal and he described to me the rings that Mrs. Shortal had. It is correct that I have testified in this case twice before; I don't recall whether I have previously testified that Schwartz told me about any of the Shortal jewelry or that he described any jewelry that Mrs. Shortal had or not.

I do not know that until this night in the third trial of this case I never even uttered a single sentence or even indicated that Schwartz told me anything about the jewelry that Mrs. Shortal had; I believe that I discussed that with Captain Fritz. Mr. MacNicoll was in this case one time before here, the last time.

With reference to my being made to testify, or testified, that Schwartz told me about Mrs. Shortal's diamonds and described them to me in the former trials, I will state that I wasn't asked about that.

I did testify here on my direct examination that the proceeds from the Shortal robbery, by agreement, would be split one-third to me, one-third to Bennett and one-third to Schwartz; that's correct. I also testified before and it is a fact that Schwartz, for his duties to get his one-third of such proceeds, was to do three (3) things: Number 1, Schwartz was to give Bennett and I the information about [fol. 162] the Shortals; Number 2, Schwartz was to furnish the guns; and, Number 3, Schwartz would furnish the money for the preparation.

With reference to the first thing that Schwartz was to do being what in my profession is called "case the joint", which is what we call it when somebody looks for something and then tells me about it, I will say that Schwartz was the "finger man"; that is the man that gets a layout of the place and tells me what all to do and how to do it. I say that the Defendant Schwartz carried that assignment out.

In regard to our not even knowing where the Shortals lived up until 10.30 on the very day of this robbery, before we went by there the first time in the early afternoon, an hour or so ahead of the time, I will say that we did not know that information until Schwartz told us the "number". I have heretofore testified that Schwartz did not show us where the Shortal house was; we were working on other things at that time; before that we didn't even know where the Shortal residence was; we didn't know whether the house had 3-rooms or 20-rooms; we had never heard the name before.

It is absolutely not true that Bennett and I heard of Mrs. Shortal from the people that we had been posing before as Officers or that Bennett and I had spotted Mrs. Shortal at those times with her Cadillac car; Bennett and I absolutely did not trail Mrs. Shortal to that place on Swiss Avenue.

With reference to my having testified on a previous trial [fol. 163] here that Bennett and I went out there on Swiss Avenue to that apartment house trying to locate a Cadillac automobile that Mrs. Shortal was driving, I will say that we were seeing if Mrs. Shortal was there at that time of the morning. In regard to our not even knowing at that time where Mrs. Shortal lived, I will say that we were seeing if Mrs. Shortal was out there; we were seeing if Mrs. Shortal was out there at that time of the morning.

I believe that Bennett and I did know before that where Doctor and Mrs. Shortal lived; I believe that Schwartz had written the address down and, then, he tore it up and he destroyed it, and Bennett said that he had a good memory for figures; Schwartz said, "That's right; don't ever keep anything written down." I believe that that was before we all went out there that morning to see if Mrs. Shortal was out there. I believe that that came out on the first trial.

here; I don't recall if I testified to that on the second trial here, the fact that Schwartz wrote some number down.

With reference to what person found the address where the Shortals lived, I will say that Bennett put his finger down on it, turned the phone book around and Schwartz said, "That's right; that's it".

Until one hour before we went to the Shortal house Bennett and I did not know where that house was because we didn't get there that morning until 8:30; that is correct; [fol. 164] we didn't know the house address before that time.

Bennett absolutely had not spotted Mrs. Shortal in her Cadillac, seen her diamonds and followed her; he didn't do that; neither did I.

The first time that we went to the Shortal residence that morning we were in a Buick automobile. When I was arrested out there on Haskell and Live Oak Streets, Bennett and I were in an Oldsmobile automobile; Bennett was in that car when I was arrested.

With reference to Schwartz doing three (3) things, (1) furnish the information—that is, "case the joint", spot the place, tell Bennett and I about how to proceed, (2) furnish the guns, and (3) furnish the money, I will say that I couldn't and wouldn't have robbed Mrs. Shortal if Schwartz hadn't given us the guns and the information.

The last time that I had had a gun in my possession before I got this (indicating) \$12.00 pistol from Tommy Schwartz was when I was arrested in Cincinnati, Ohio; they did take a gun off of me there; I did not get another gun until I bought that \$12.00 pistol from Schwartz here.

By virtue of my buying that (indicating) gun from Tommy Schwartz, the Defendant, this was not necessarily done for the purpose of robbing the Shortals; if Schwartz had not given Bennett and I the information, we never would have robbed their place. I never had any pistol before I bought the \$12.00 pistol there (indicating) from [fol. 165] Tommy Schwartz before the Shortal robbery.

With reference to whether or not the Defendant gave us any money before the Shortal robbery, I will say that I believe Schwartz gave Bennett and I \$10.00 the night before the robbery of the Shortals; that money was for gasoline

and for expenses in "casing" another job; this \$10.00 that Schwartz gave us was not given to us on the morning of this Shortal robbery; he gave us that \$10.00 the night before the Shortal robbery; we had just come in.

On the morning of the Shortal robbery, February 17th, 1950, Bennett and I first went up to the Shortal residence. I imagine, oh, around 10:30 or 10:00 A. M.; I don't recall the exact time; we there encountered one of the servants and we had a conversation with that servant with reference to when Mrs. Shortal would return home, and the servant told us that she would return around 4:00 o'clock P. M.

That afternoon I went to a picture show and Bennett went his way; Bennett went somewhere else. Bennett and I returned to the Shortal residence between 3:00 and 3:30 P. M.; it was closer to 3:30 P. M. At that time I had a pistol and Bennett had a pistol. I couldn't be the judge of whether Bennett was drunk or sober at that time; in other words, I don't know whether Bennett was drunk or not.

We both went in there and Bennett put his weapon on [fol. 166] Mrs. Shortal and I took Mrs. Shortal upstairs; and I took Mrs. Shortal's rings off of her, and I locked her in that closet.

I did not ask Mrs. Shortal where the safe was; I don't recall that. Now, Bennett may have asked her; I don't recall asking Mrs. Shortal about the safe; I don't recall asking Mrs. Shortal anything. I was not looking for a safe directly. With reference to my having asked Mrs. Shortal anything about a safe and recalling it now, I will say, Mr. Hughes, that about the time that I got Mrs. Shortal's rings Bennett hollered up and said "this"; I ran downstairs—I put Mrs. Shortal in the closet and went down the steps; there couldn't have been much discussion. When I got her rings I don't recall whether I then asked her about the safe or not. I did ask Mrs. Shortal where the money was; Mrs. Shortal told me that her money was in her purse downstairs.

With reference to my thinking that she had some money in a safe there, I will say that I don't even recall asking Mrs. Shortal about the safe, Mr. Hughes. Anyway, whatever money Mrs. Shortal had, Bennett and I got it and Bennett and I got her rings.

In regard to my having been with Bennett at every time

that Bennett went out there and talked to Schwartz, I will say that I believe that Bennett called on Schwartz twice when I was not along. What Bennett told Schwartz on those occasions about his domestic troubles, or about any [fol. 167] diamonds, I wouldn't know about.

After Bennett and I had gotten these Shortal diamonds we took them to Schwartz's Pawnshop; we did absolutely not want to pawn them or "soak" them with Schwartz; that's not true. From the day that Schwartz told Bennett and I that he wanted to examine those Shortal diamonds and determine their worth and, as I have said, he looked at them through a spy glass that I have talked about, I did not ever see those Shortal diamonds again.

After that time Schwartz did give Bennett and I certain sums of money. Bennett and I later on went to Houston and I went to Greenville; I went to Greenville and, then, to Houston; I went to Greenville in the meantime.

On March 4th, 1950, after my seeing Schwartz on the street here, I had several conversations with Schwartz about meeting him; I, then, told Schwartz that we would be at the corner of Live Oak and Haskell Avenue and I either wanted to know if Schwartz would meet us there in about 15-minutes or Schwartz told me that he would meet us there in 15-minutes. At that time Captain Fritz came up instead of Schwartz and he put me under arrest.

I laid in the City Jail for several days and, then, I came down here and I was placed in the County Jail. I don't recall how many telephone conversations I had with Schwartz after being placed in the County Jail down here. [fol. 168] With reference to my having previously testified that I had some twenty (20) or twenty-five (25) telephone conversations with Schwartz, I will say that it was any number of them; those are the conversations that I told Mr. Wade about, when I was brought down to the Sheriff's Office and they were recorded.

In regard to my not knowing who was on the other end recording those conversations, I will say that Mister Schwartz would not have said the things that he did if it was being recorded to his knowledge; I would bet my life that they were not being recorded there.

I absolutely did not make any attempt to or threaten to

kill Mrs. Shortal while I was there and neither did Bennett. Naturally, I had my gun loaded.

I did say that I registered into The Adolphus Hotel after this robbery; when I registered into that hotel I used the name of Captain F. S. Tartar; I don't recall which Air Field I gave as my address at that hotel; I really don't know if it was some Army Post. I believe that Bennett registered for us both so I don't know what addresses he gave. Bennett registered at the hotel for both of us while I parked our car.

I believe that Bennett registered himself in at the hotel then as Major Scott Travis; I really wouldn't say where Bennett said he was from, I wouldn't be sure whether he registered from Chanute Field, Illinois, or not.

[fol. 169] Bennett and I checked out of The Adolphus Hotel here the next day just before lunch; I believe that Major Scott Travis moved across the street to the Baker Hotel there. I believe that I did make two (2) or three (3) different calls from Greenville trying to contact Bennett and the Baker Hotel. I did visit the "Major" over at the Baker Hotel here; I believe that it was on a Wednesday morning. There was some woman with Bennett when I visited him over at the Baker Hotel, I believe; I cannot even think of her name; it was one of your "star witnesses"; I don't know what her name is.

I absolutely did not have any conversations or place any telephone calls from The Adolphus Hotel here, either from my room or down in the lobby at a telephone pay station, to Detroit, Michigan, or Chicago, Illinois. With reference to my being present at any time when Bennett did so, if he did, I will say that I know, he didn't; I am sure that he did not.

I guess that Bennett was staying at the Baker Hotel while I was spending some little time in Greenville. I did phone Bennett at the Baker Hotel here from Greenville but I could not contact him; Bennett was not in his room.

Bennett never did tell me in anybody's presence that he was getting out of the Air Corps and was staying at The Officers' Club at Carswell Field, Fort Worth; I don't recall any such conversation as that; I don't know about that.

Redirect examination.

{fol. 170] By Mr. Wade:

I am the same man who was testifying here yesterday when the court adjourned. In the robbery of Mrs. Shortal out there Lester Emmett Bennett was present there with me. The Defendant Schwartz was not present with us out there; Schwartz was not out at the Shortal home.

I identify State's Exhibit, No. 4, that you have shown to me as being a recording that was made in the Sheriff's Office here on March 18th, 1950; that was a conversation on the telephone between the Defendant, Tommy Schwartz, and myself on that date.

I believe that in that conversation I told Schwartz that my sister had just got into town and that we were hiring an attorney, or that she was retaining an attorney; we discussed an attorney named Bob Allen, and I asked Schwartz if he could come over and see me the following day. I was talking to Tommy Schwartz about that. Schwartz said that he would try to come and Schwartz wanted me to hold up on an attorney from the way he talked until he could talk to me and, then, we could get our stories straight. I believe that in this particular record (indicating) Schwartz told me to hold my story "pat" until we could get together. I believe that that is about all that I can remember about that conversation.

I believe in this State's Exhibit, No. 5, that you now show me that I asked Schwartz about the gun and if he kept [fol. 171] records on the guns in his books, which he said, "No"; and I asked Schwartz if he had gotten in touch with Captain Fritz and had found out if they had gotten the guns; Schwartz said, "No", and he told me, then, "Well, partner, I will be over and see you"; Schwartz didn't want to talk to me on the telephone too much. I believe that this (indicating) conversation was on the following day or the day after, the best that I recall.

In all of these telephone conversations after I had been arrested and had been brought down to the County Jail here from the City Jail they were recorded here in the County Jail.

In this particular record which you now show me, State's Exhibit, No. 6, (indicating), the best that I recall, Schwartz

mentioned that there was no use of ten (10) drowning when one could drown and save the others. I was talking to Schwartz and that is what Schwartz said. The only other thing that Schwartz said in that conversation was that he was getting an attorney and was coming over to see me, which he promised in every conversation; his attorney was due over that day or the next day to talk to me. That is the best that I can recall now on that telephone conversation.

I have now examined State's Exhibit, No. 7, which you have shown me, and with reference to the date I will say that these telephone calls were made on three (3) consecutive days—either the 19th or the 20th, I believe.

[fol. 172] This telephone conversation was with Schwartz and I believe that this (indicating) was a short conversation; I called Schwartz late at night at the liquor store, I believe, and Schwartz said to me, "I cannot talk; I have got to hang up; here comes my old man; I cannot talk; no, sir; I cannot talk," and Schwartz hung up. That is about all of that conversation, in that (indicating) record.

I believe in this record, State's Exhibit, No. 8, which you have shown me, is where I mentioned "Scotty"; I asked Schwartz if he had seen "Scotty," who was Bennett, and Schwartz said, "No", that he hadn't seen anybody; then I asked Schwartz if he had been indicted, or Schwartz told me that he had been indicted, and I asked Schwartz, "What did they indict you for?"; and Schwartz then said, "What you told them"; and, then, I asked him if he was coming over; Schwartz said, "No; I am scared; I am scared to move"; Schwartz said, "I will try and get my attorney to come over and see you".

This (indicating) record is a continuation of the conversation between the Defendant Schwartz and I and it is State's Exhibit, No. 9. This continuation of this (indicating) record. I believe in this record is where Schwartz and I also talked about the attorney that was coming over, and in this record I believe, Schwartz got scared because I had used the telephone any number of times, and Schwartz told me that I used the telephone too much; Schwartz said, "We [fol. 173] had better not be discussing this over the phone; I will try to get there or have my attorney come over there and see you". I believe that this (indicating) is the record where he was getting suspicious.

After this robbery of Mrs. Shortal the first time that I noticed anything in the newspapers about it was either late that night or early the next morning.

From the time of this robbery until the time that I was arrested, I would imagine that I had seven (7) or eight (8) occasions to meet and have conversations with the Defendant Schwartz. I would say that I talked to Schwartz on the telephone eighteen (18) or twenty (20) times with reference to meeting him somewhere or getting some money. This went on until March 4th, 1956, some 2 weeks or a little more after the robbery, and then, the Defendant Schwartz finally didn't show up out there.

During all of this time I did not have the Shortal jewelry; I say that Bennett and I had given the Shortal jewels to Schwartz.

I am under indictment for this Shortal Robbery; I am guilty of that Shortal Robbery. Neither you or Mr. Mac-Nicoll or anyone else has promised me anything to testify in this case; nobody representing the State has promised me anything for testifying in this case; for that matter no one has promised me anything for so testifying.

[fol. 174] I have been to the penitentiary one time before; that was for Armed Robbery; The sentence was "Life"; I have only had one conviction; I have been paroled twice; I was later sent back to the penitentiary.

Re-cross examination.

By Mr. Hughes:

With reference to whether I meant that I had only been to one penitentiary when I said before that I had only been to the penitentiary once, I will say that I have only had one conviction. I say that I have only been in one penitentiary; I have been in the penitentiary and have been released from the penitentiary on one conviction. I did go to the penitentiary for life; I was not released from the penitentiary; I was paroled from the penitentiary. I did not go back to the penitentiary on any robberies or felonies.

I did testify that I went to the penitentiary for Life; it is right that I was "turned out" of the penitentiary; I was not, then, sent back to the penitentiary; I did not go back to the penitentiary; I was never back in the penitentiary;

I was paroled; I did not escape while I was on the way back from my parole. I did not testify here yesterday and two (2) other times about my criminal record and going back to the penitentiary.

That is wrong there; I was not sent back to the penitentiary on March 18th, 1938; that was to a Reformatory.

I was born on September 9th, 1915; I was 22-years old when I went to prison for Life; I believe that I was released from prison in 1946 the first time after I had been sentenced for Life; I was returned to prison after my parole had been revoked on September 9th, 1947, I believe. I also believe that I was again released from prison on a parole in 1948 or 1949; I was never sent back to prison again after revocation of my parole on that Life Sentence.

I was released from prison in 1947; on those other convictions that you talked to me about yesterday and are asking me about now, I was not charged and sentenced on them; I had never gone back to prison.

I was charged with Housebreaking in 1935, at Cincinnati, Ohio, under the name of William Jarrett, No. 30,428; I was born in 1915. With reference to my being charged under the name of Trent Jarrett, No. 4,315, July 23rd, 1936, in South Bend, Indiana, with Grand Larceny and being a Fugitive, I will say that I was never indicted on any of those charges; I had one indictment and I went to the penitentiary.

I did not escape from any place in 1947; I believe that my last escape was from Cincinnati, Ohio, Jail and was on January 7th, 1950. With reference to the following question, "On March 18th, 1938, you were serving a Life Sentence and you got out of the penitentiary—that's right, isn't [fol. 176] it?"; and the following answer, "That's right", and whether or not I testified to that, I will say that I didn't get out on March 18th, 1938; I went to the Reformatory on March 18th.

I was paroled from my Life Sentence. The following question, "And, then, you committed those others after you got out on parole", and the following answer, "I was returned for parole violation for carrying a gun", are correct; I did also testify that I went back into the penitentiary in 1946.

With reference to the following question, "That is the second time that you had a Life Sentence put to you?", and the following answer, "Yes", I don't recall now whether I testified to that or not; I have had one life sentence, Mr. Hughes.

I say that Bennett went into the pawnshop of Tommy Schwartz the next day after I was first in there to buy this (indicating) gun that I say that I paid \$12.00 for. With reference to it being my testimony and if I testify that I had not been in the pawnshop of the Defendant Tommy Schwartz between the time that I went in there and bought that (indicating) gun and the time that Bennett and I went in there, I will say that I was in there one evening and that Bennett also went in there with me on the following evening; I bought that (indicating) gun just before closing time one afternoon and the next afternoon, why, Bennett and I both went in there. Bennett absolutely did not go in there and pawn a watch and borrow \$15.00 on it.

[fol. 177] With reference to the following questions and answers being shown on page 85 of the transcript of a previous trial: "Question. You know that Bennett pawned a wrist watch to him for \$15.00?", "Answer. I didn't know how much he got for it", "Question. Sir?", "Answer. I didn't know how much he got for it", "Question. He pawned a watch?", "Answer: He may have", "Question. You saw him because you said, you didn't know whether it was a Hamilton or what kind of a watch but did you see him pawn a watch?", "Answer. Yes; I saw him pawn a watch", and whether or not I testified to that at a former trial, I will say that I don't recall that, Mr. Hughes; Bennett had a watch that he was getting a crystal for.

In regard to my having testified here yesterday that Schwartz told Bennett and I to tie up whoever was out there with light picture wire because it was hard to untie, I will say that Schwartz told us to either use cord or picture frame wire. I don't recall whether I testified at all before on these other trials anything about picture wire or not, or whether I mentioned it or not.

With reference to the following questions and answers being shown on page 33 of the transcript of a previous trial, on direct examination by the then District Attorney: "Question. Did he tell you what type or what kind of mate-

rial to use?", and the, "Answer, He told us that on this job to take special care to tie the people up with a soft cord, [fol. 178] that it was harder to untie than if we had a large rope", I will say that that is right. As to Schwartz having said to use picture wire or picture frame wire, I will say that Schwartz said to use either cord or picture wire.

I did so testify here about certain records of conversations that I had with Tommy Schwartz, which were taken down and recorded and about which I have told the jury here about certain parts of. I had been under arrest for Highway Robbery, or Robbery with Firearms, for several weeks before those conversations took place.

With reference to my being brought down by the District Attorney and his Assistants—Mr. Will Wilson then being the District Attorney—and going into a room rigged up as a studio down in a room in the Sheriff's Office adjoining the Sheriff's private Office, I will say that I don't believe that it was rigged up as a studio; they did have a wire recorder there; I was ready there to carry on a conversation with Tommy Schwartz; the District Attorney didn't carry on a conversation; they were not taking it down there; they were not talking to him.

In regard to it being true that these recorded conversations were not voluntary conversations between Schwartz and I but that it was a case of my making certain statements there that could be recorded, I will say that it was my idea, Mr. Hughes, in the first place to make the recordings, to get [fol. 179] "my partner", who let me down. I have never seen a telephone up there in any cell in this jail; that was all transacted down there in the Sheriff's Office.

There were approximately twenty-five (25) conversations that were recorded: Bennett had not been apprehended at that time; I do believe that the Officers were looking for him at that time; Schwartz had already had me arrested. I did not know then that Schwartz was working with the Police Department trying to catch Bennett. Sure, I knew when I was having these conversations with Schwartz that he had turned me in; when Schwartz got put into it he turned me in.

These recordings were my idea to try to trap Schwartz into some admissions; that is right. I did not know that,

while the District Attorney and I were on one end, Schwartz was acting for the Police Department trying to get information to get Bennett arrested and was on the other end.

Redirect examination.

By Mr. Wade:

I will tell the jury about what happened when Bennett went in there about this watch; Bennett had a broken crystal and he left the watch with Schwartz to get the crystal repaired; I believe that it was repaired and that Bennett got it back.

Recross-examination.

[fol. 180] By Mr. Hughes:

With reference to whether or not I heard anything about a crystal until Mr. Wade asked me if that wasn't a crystal that Bennett wanted to get fixed, I will say, Mr. Hughes, that I believe, if you will read my previous court testimony, you will see it. I don't recall if I mentioned that before or not now.

(Witness excused.)

HUBERT DAVIS, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Wade:

My name is Hubert Davis; I am 44-years of age; I live at No. 2715-Cochran Street; I am employed at the Day & Night Pawnshop; I have been employed there since July, 1940.

Mr. Thomas J. Schwartz owned that place in 1940; that is the defendant here that is on trial now.

I recall the date of the Shortal Robbery, February 17th, 1950; I knew Tommy Schwartz at that time; in fact, I worked for him then. Previous to that robbery I did have

[fol. 181] an occasion to see two (2) men in there who later have been identified to me as Jarrett and Bennett; I had an occasion to see Jarrett and Bennett both in that pawnshop previous to this robbery out there; to the best of my knowledge I saw them in there twice.

You have shown me here State's Exhibit, No. 2, and I say that I have seen this (indicating) gun before; I saw that gun in that pawnshop up there. I saw it there in this connection, that Mr. Schwartz told me to take the gun upstairs and to try it out to see if it would shoot. At that time one of the men, Jarrett and Bennett, was there with Schwartz at that time; both of them were present there at that time.

I don't recall how many days this was before the Shortal Robbery but it was several days though. I shot this (indicating) gun twice and brought it back downstairs and gave it to Mr. Schwartz. While I was there I did not see Mr. Schwartz give this gun to either Jarrett or Bennett; I went on up to the front of the store.

With reference to Mr. Schwartz asking me anything about whether the gun would shoot when I handed it to him, I will say that he heard it shoot; I told Mr. Schwartz that it would shoot; that was a few days before the robbery. I say, I saw Jarrett and Bennett there in that pawnshop about twice before the Shortal Robbery.

After the Shortal Robbery I had an occasion to see either [fol. 182] Jarrett or Bennett in there after the robbery; I saw the one that wears glasses, the one that I saw here this morning; that is Jarrett. I wouldn't know how long it was after the robbery that I saw Jarrett around there but it was several days; I wouldn't know for sure; it was several days after the robbery out there.

Previous to my seeing Jarrett up there at that time I did have a telephone conversation with Schwartz concerning \$50.00; I was there in the pawnshop when I received the telephone call, in the Day & Night Pawnshop; I received this telephone conversation from Schwartz there and Schwartz told me that "a man" would be by there that I had seen in the store before and to give him \$50.00; the Defendant Schwartz did not say how I was to give it to him; he just said to give him the \$50.00. Mr. Schwartz did

not say anything about putting it in a brown envelope; I put it in there myself.

Later I saw Jarrett come up there; Jarrett was in a taxicab; when I saw him out there I carried the \$50.00 to him and I gave it to him. As to how I gave it to him or if I just handed it to him, I will say that I had the money in an envelope and that I just passed it to him. Jarrett was there in a taxicab.

That is the same day that Schwartz, the Defendant, directed me to send a Money Order to Houston; he told me to send it in care of Louise Kendricks, I believe. [fol. 183] Schwartz told me to send one hundred (\$100.00) dollars, I believe, to Louise Kendricks down in Houston; I did that, I believe, on the same date that I gave Jarrett that \$50.00.

You have shown me ~~there~~ a photostatic copy of a Western Union Money Order, marked for identification as State's Exhibit No. 11; that (indicating) Exhibit is a copy of the Money Order by which I sent the money to Houston, Texas; that (indicating) is my writing on there. After examining this copy of the Money Order, I now see that I only sent \$50.00 down there, less the sending charges. This (indicating) photostatic copy shows my handwriting on there; I filled out this (indicating) Money Order for the \$50.00, less sending charges, shown on there, myself.

(Reporter's Note: This photostatic copy of Western Union Money Order Application, dated March 2nd, 1950, for \$50.00, was introduced in evidence as: The State's Exhibit, No. 11, and the same appears at the rear of this transcript, in numerical order.)

I didn't notice the date on that Money Order; I have looked at it now and have found the date, which is March 2nd, 1950; I believe that that is the same date that I gave [fol. 184] Jarrett that \$50.00, and the date that I sent the \$50.00 down to Houston.

I was born in Greenville, Texas; I came down to Dallas along about 1928.

I recall reading about the Shortal Robbery. At that time Mrs. Shortal had a negro maid out there named Ellen Pace Williams; I had been acquainted with her since 1926; she

had been a maid out there at Mrs. Shortal's house since along about the last of November. I did talk to her one time when she was on the telephone at the Shortal residence and I was down at this pawnshop; I had a telephone conversation with her.

The maid out at Mrs. Shortal's house previous to the employment of Ellen Williams was named "Clark"; her husband's name was Dave Clark; I know Dave Clark; I had known Dave Clark and his family for five (5) or six (6) years. I do not know for sure how long Mrs. Clark was the maid there at the Shortal residence; it was a pretty good while though; I mean, she was for a number of years.

I had known this maid, Ellen Pace Williams, to have been the maid in the Shortal home since around the last of November, 1949, or the first of December, 1949, along in there. I called her from that pawnshop; I made the call myself.

That (indicating) Western Union Money Order shows the Sender's name to be "T. J. Stewart"; I signed that name on there because Mr. Tommy Schwartz told me to; [fol. 185] he told me to sign the name of "T. J. Stewart" on there.

Cross-examination.

By Mr. Monroe:

I did testify that I had been employed at the Day & Night Pawnshop since 1940; Mr. Schwartz owned that pawnshop at the time that I was first employed in there; I am now employed there, myself; Mr. Nathan Rosen is the owner of that pawnshop at this time; I believe that he bought it on April 13th, 1950.

I also testified that I had seen both Jarrett and Bennett in that pawnshop on at least two (2) occasions before the Shortal Robbery. I would not say positively about what dates I saw them in there.

That (indicating) is not the gun that I identified; that (indicating State's Exhibit, No. 8) is the gun that I identified; I remember that (indicating) gun; I don't remember the date that that (indicating) gun was bought there; I

don't know whether Jarrett or Bennett bought that gun up there; they were both in there.

With reference to whether either Jarrett or Bennett had previously bought another gun a day or two before they bought that (indicating) gun, I will say that I don't know anything about another gun; I didn't handle it. I don't know what was paid for that (indicating State's Exhibit, No. 1) [fol. 186] gun. In regard to whether any money changed hands or whether there was anything paid in addition on that gun transaction there, I will say that there was some money mentioned but I don't know how much it was; money was mentioned by Mr. Schwartz. With reference to my knowing whether or not another gun was turned in there that he had previous- bought and this (indicating) gun was sold to Jarrett for some sum of money in addition, I will say that I heard them mention some money but I don't know about buying that (indicating State's Exhibit, No. 2) gun. I do say that some sum of money was mentioned by Schwartz with regard to that (indicating) gun.

I tried that (indicating State's Exhibit, No. 2) gun out upstairs to see if it would shoot all right; Mr. Tommy Schwartz asked me to do that; I took the gun upstairs on the third floor; my purpose in going up there was to try the gun out to see if it would shoot all right; we do that whenever we "lease" them.

I did say that there was some conversation about the money for the purchase of that (indicating) gun but I don't know whether any money passed from either Jarrett or Bennett to Schwartz after the gun was purchased; I went on up to the front of the pawnshop; I did not see any money in the hands of either Jarrett or Bennett; I went on up to the front of the pawnshop there.

If either Jarrett or Bennett took that (indicating) gun [fol. 187] out of the pawnshop there I don't believe that it has been back in that pawnshop since.

There was some money mentioned by Mr. Schwartz in reference to that (indicating) gun but I don't know how much; who paid it or received it I do not know.

(Witness excused.)

JESSE LEE THOMAS, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Wade:

My name is Jesse Lee Thomas; I am employed at No. 4217-Swiss Avenue; I work for Doctor W. W. Shortal.

On February 17th, 1950, I was working at No. 7210-Lake-wood Boulevard in the house; I am a Yardman; I was working for Doctor W. W. Shortal. On that date, about 10:30 or 11:00 o'clock in the morning, something unusual did occur out there; it was a couple of men that came out there that morning about that time and they asked for Mrs. W. W. Shortal. I have later learned who those men were; they were Shortal and Bennett.

[fol. 188] I told those men that Mrs. Shortal was gone for the day and that she wouldn't be back until about 3:30 or 4:00 o'clock that afternoon. They then left and they later came back out there; they returned at about 3:30 o'clock P. M.; they were the same men that had been there about 10:30 or 11:00 o'clock that morning. They asked for Mrs. Shortal again; they did not come in right then; I had to let them in.

These two (2) men tied me up; they tied me up with some kind of little twine; it looked like little rope that you tie sacks with. They, then, took the maid upstairs and tied her up. I unloosed myself and I left there. These two (2) men had guns. I went next door to Mrs. Kaufman's. I got loose before Mrs. Shortal arrived; I called the Police from Mrs. Kaufman's. I did not come back until I had seen them leave. Then, I returned and I released Mrs. Shortal.

Cross-examination.

By Mr. Monroe:

As to how these two (2) men got into the house I will say that, when they came to the house, they asked for Mrs. Shortal and I told them that she was not there; they said, well, that they would like to see her; they asked me was I

sure that she would be home about 3:30 or a quarter to 4:00; and I told them that I was; one of these men said, "I believe that I will leave her my card"; and they stood there [fol. 189] in the door a few minutes; I was standing there in the door waiting for them to pull out when one of these two (2) men pulled out a pistol and told me to open the door and let them in. When he pulled a pistol on me, I, of course, let them in.

The one of those two (2) men that is here now is the one that tied me up with that cord; I don't know his name; I don't know their names apart; I just know their names; it was the one that just left the court room; I think that it is Jarrett that tied me up out there.

Redirect examination.

By Mr. Wade:

Ellen Williams is the name of the negro maid that was out there at that time, Ellen Pace Williams; she was working out there at that time.

I know Hubert Davis; I knew Hubert Davis when he worked for Schwartz's Day & Night Pawnshop down there.

(Witness excused.)

(Reporter's Note: At this time there was marked as:

STATE'S EXHIB., No. 12

The transcript of the testimony before the Dallas County Grand Jury of the Defendant, Thomas J. Schwartz, a stipulation being entered into between The State of Texas and [fol. 190] the Defendant that same is the Grand Jury Testimony of the Defendant, Thomas J. Schwartz, that certain portions of said Grand Jury Testimony of said Defendant are to be introduced in evidence at this trial by both The State of Texas and the Defendant, that the Defendant was duly sworn before testifying before the said Grand Jury at that time, that all of the requirements with reference to it have been complied with, and that the same is subject to interrogation by both The State of Texas and the Defend-

ant. The following portion was first offered by The State of Texas at this point:)

"T. J. SCHWARTZ, Testified March 21, 1950, White:

Q. All right, now, when is the next time you saw him after they came in there with the watch, when Bennett and Jarrett came in there with the watch—when is the next time—visit—after that?

A. The next visit is when he came with the Shortal Jewelry.

Q. That was the day of the Shortal Robbery?

A. Yes, sir.

Q. About what time of the day was that?

A. When they came in there?

Q. Yes, sir.

A. About 4:30 or 5:00 o'clock.

Q. In the afternoon?

[fol. 191] A. Yes, sir.

.

Q. Had you communicated with anybody about the jewelry between the time they brought it to you and Friday before the arrest?

A. Yes, sir.

Q. Who did you communicate with?

A. Mr. C. E. DeWitt.

Q. C. E. DeWitt?

A. Yes.

Q. What is his full name?

A. I don't know, just C. E. DeWitt; he is an Insurance Adjuster.

Q. When did you see Mr. DeWitt?

A. Oh, about four (4) or five (5) days before I saw Captain Fritz.

Q. All right, and what was the subject of that conversation?

A. Well, I read in the papers about it being forty thousand (\$40,000.00) dollars worth of jewelry; I figured the difference in the price that it could be bought for and the money that could be gotten; I asked him, was there forty thousand (\$40,000.00) dollars insurance and what he was able to pay for it back, if he wanted it; and he said, 'There

isn't no forty thousand (\$40,000.00) dollars worth, [fol. 192] Schwartz'. He said, 'There is about fifteen thousand (\$15,000.00) dollars worth'; and, so, dickering around there and the difference of the fourteen hundred (\$1,400.00) dollars and what they wanted for it, there was a few days lapse that I didn't explain it to all to Captain Fritz.

Q. Did Mr. DeWitt offer to buy the jewelry from you?

A. No, sir; he said, he would pay the Reward of ten (10%) per cent.

Q. Ten, (10%) per cent of the value of the jewelry?

A. Yes, sir.

Q. Which would be ten (10%) per cent of fifteen thousand (\$15,000.00) dollars?

A. I think, he said it was fourteen thousand (\$14,000.00) dollars.

Q. He could pay you fourteen hundred (\$1,400.00) dollars?

A. Fourteen hundred (\$1,400.00) dollars.

Q. He offer to pay you that?

A. He didn't offer to pay me anything. That is what he could pay.

Q. Now, did you offer to sell him the jewelry or return it to him for fourteen hundred (\$1,400.00) dollars?

A. Never did say no more to him.

.

(Reporter's Note: The following portion of the Defendant's Grand Jury Testimony was offered by his counsel at this time:)

Q. State your name, please, sir?

A. T. J. Schwartz.

Q. Are you known as Tommy Schwartz?

A. Yes, sir.

Q. Can you hear all right?

A. Yes; everything is fine.

Q. What is your occupation, Mr. Schwartz?

A. I run the Day & Night Pawnshop.

Q. You have a liquor store there also?

A. Yes, sir.

Q. What is the name of your liquor store?

A. Schwartz Liquor.

Q. And the address of that?

A. 2408-Elm Street.

Q. You been in that business for some years, Mr. Schwartz?

A. Yes, sir.

Q. You have been subpoenaed as a witness here in two (2) cases, one against a man named Bennett and one against a man named Jarrette—J-a-r-r-e-t-t-e. Just tell us what you know about those cases, Mr. Schwartz?

A. Well, the way it began, the fellows come in there.

Q. You'll have to talk a little louder, please, sir.

A. Came in there and sold me some jewelry.

Q. Who did that?

[fol. 194] A. I believe it was—well, it was both of them?

Q. Both Bennett and Jarrett?

A. Yes, sir.

Q. When did they come into your place?

A. Oh, let me see, the first time the little fellow—I think that his name was Jarrett—he came in there several weeks before the other fellow did, Bennett, and he bought—he came in there with a woman, and she bought a little watch; then, he said, 'You got some kind of a cheap gun? I need one for protection'; and I said, 'Yes'; and I sold him one and the first gun was \$15.00.

Q. Now, to get our dates straight, this robbery was on the 17th—this was before the robbery?

A. Oh, yes, sir.

Q. How long before the robbery?

A. I would say, about 2-weeks.

Q. You remember now, about 2-weeks?

A. Yes, sir.

Q. What was the woman's name?

A. I don't know that woman's name. I gave the description of that woman to Will Fritz, and he called her name, but I forgot; I forget right now.

Q. Was—did he call the name 'Guy'?

A. The woman?

Q. Yes.

[fol. 195] A. No, sir; I don't believe so.

Q. He called some other name?

A. I just forget altogether. He knows the name.

Q. Uh, huh. That was about 2-weeks—that was about 2-weeks before March 17th, as well as you remember?

A. What day did you say the robbery was?

Q. I believe, it was March 17th?

A. It was—

Q. I beg your pardon—February 17th.

A. It was about two (2) or three (3) weeks before that, that I first seen him.

Q. The first time you saw Jarrett, he was in company with a woman?

A. That is correct.

Q. She bought a wrist watch and he bought a pistol?

A. Yes, sir.

Q. What type of pistol was that?

A. A little '38'—top-break.

Q. Do you know the name of it?

A. I believe, it was an Iver-Johnson.

Q. Iver-Johnson? What did he pay you for that pistol?

A. \$15.00.

Q. In cash?

A. Yes, sir.

Q. He buy anything else?

[fol. 196] A. At that time?

Q. Yes, sir.

A. No, sir.

Q. When was the next time you saw him?

A. The next time, about 10-days went by.

Q. Come a little louder, Mr. Schwartz?

A. About 10-days later; he came in with this other fellow and pawned a Hamilton watch there.

Q. The other fellow was Bennett?

A. I suppose so; I never seen him since.

Q. They pawned a Hamilton watch?

A. Yes, sir.

Q. How much money did you give them on the watch?

A. \$15.00.

Q. You still have the watch?

A. No, sir; he took the watch out later.

Q. All right, now, then, tell me again how many days was that after the visit by Jarrett and the woman?

A. I would say, around 10-days, 2-weeks.

Q. No, then, when is the next time that you saw either

one of them? Now, at the time they came in to get the watch, were they both together?

A. Yes, sir.

Q. When is the next time you saw either one of them?

A. I guess, it was about the same thing, maybe, a week or [fol. 197] 10-days.

Q. A week after that second visit?

A. Yes, sir.

Q. Were they both together?

A. Yes, sir.

Q. Did they have anybody else with them?

A. If they did, I didn't see them; they didn't come into the store.

Q. This third visit, was it before or after the robbery?

A. The third visit was after the robbery.

Q. And what time of day did they come in there?

A. About 4:00 o'clock.

Q. How soon after the robbery was it?

A. I don't know that; sometime during that same evening.

Q. Sometime during the same day of the robbery?

A. I think so; I am pretty sure.

Q. All right, now, what transpired at that occasion?

A. They come in there; he talked to me before—this little fellow said something about, did I want to buy some jewelry, that they had some—he had to get it.

Q. Now, Jarrett talk to you about jewelry before?

A. Yes, sir.

Q. When did he first talk to you about jewelry?

A. About the second occasion that he came in, not the day he was with that woman—about 10-days after the first [fol. 198] day I saw him.

Q. When Jarrett and Bennett were together?

A. No; he was by himself.

Q. By himself on the second visit?

A. I think, he was in there once; I am pretty sure, he was in there once by himself. That is right. He claims the first gun I sold him—that first one—he came back a few days later and said that that gun didn't shoot and he wanted to trade it for a better gun. I think, he gave me \$5.00 or \$10.00 difference, and I gave him a different gun.

Q. What type of gun was the second gun?

A. That was an automatic.

Q. Describe that?

A. It was a 32-automatic—not an American make.

Q. Not an American make?

A. No, sir.

Q. Do you know where it was made?

A. I believe, it was in Italy.

Q. Italian make?

A. I believe, it was Italian Brevetti.

Q. Describe that a little better?

A. Little 32-automatic, small one.

Q. What color?

A. Blue steel.

[fol. 199] Q. What kind of handle?

A. Plastic handle that comes on them.

Q. Plastic handle?

A. Yes, sir.

Q. And did it have a grip of some kind or just smooth handle?

A. They come in little checked—all those handles do—I think it is.

Q. When was it that you sold him that gun?

A. Well, that was a few days.

Q. The new gun?

A. The second gun, just a few days, maybe, a week.

Q. After the first one?

A. Yes, sir.

Q. Now, was he by himself on that occasion?

A. Yes, sir; he was by himself.

Q. To get these straight, the first time he came in with this woman and bought the first gun and she bought a wrist watch?

A. Yes, sir.

Q. Then, he came back and said that gun wasn't any good and he wanted to trade it on another one?

A. Yes, sir.

Q. Then is when you sold him the Italian gun?

A. Yes, sir.

[fol. 200] Q. He was by himself on that occasion?

A. Yes, sir.

Q. Was that morning or evening? Any way you can fix that visit?

A. Well, I believe, it was before noon all right, sir.

Q. Before noon?

A. Yes, sir.

Q. All this transpired before the robbery?

A. Yes, sir. Oh, yes, sir.

Q. Now, then, do you know—can you give us an estimate, Mr. Schwartz, how soon before the robbery or how many days before the robbery that you sold him the second gun?

A. It was several days—about 10 days or 12 days.

Q. Ten (10) or twelve (12) days? That is your best memory on that?

A. Yes, sir.

Q. You have any way of fixing that date from your records?

A. I believe, I do; I am not certain; I am pretty sure.

Q. What type of records do you keep on pistols?

A. We have a book that we put them in.

Q. You have all your serial numbers and descriptions?

A. Yes, sir.

Q. That book show the date you got the pistols and the date you sold it?

A. It doesn't show the date. I have a little ledger that [fol. 201] showed the date I got that, when I took it in pawn, and we turn around and sell them.

Q. Both of these guns you mention, you get them in pawn?

A. Yes, sir.

Q. The first pistol and the Italian pistol?

A. Yes, sir.

Q. They will be entered in your Pawn Register?

A. Yes, sir.

Q. Do you have anything to show the dates they were sold?

A. We have a book that we put them in.

Q. A book that you put them in?

A. Yes, sir.

Q. To show the date they were sold?

A. That is correct.

Q. You show who they were sold to?

A. Yes, sir.

Q. What the name these men use, this Jarrett; the little one you are talking about?

A. I think, he used the name of Lawrence.

Q. Lawrence? Now, then, after this visit, when he came in and swapped the first pistol for the Italian Pistol, when is the next time you saw him?

A. Well, he came down one night in a taxi and had a moving picture machine and wanted to pawn it to me for \$40.00.

Q. How long was that after the day he bought the Italian [fol. 202] pistol?

A. Just right along a few days afterwards; it wasn't many days.

Q. Were you in your liquor store?

A. I was in the liquor store that night.

Q. He came in the liquor store?

A. Yes, sir.

Q. He by himself or have anybody with him?

A. He was in a taxi-cab, I think, that night.

Q. Did he come in your liquor store by himself?

A. Yes; he came in by himself.

Q. He brought the moving picture machine in?

A. Yes, sir.

Q. What was the substance of the conversation at that time?

A. He wanted, at first, one hundred (\$100.00) dollars, and I told him, I couldn't loan him that much; I could loan him forty (\$40.00) dollars.

Q. On the moving picture machine?

A. Yes, sir.

Q. You give him Pawn Ticket for it?

A. Yes, sir.

Q. You still have that moving picture machine?

A. No.

Q. Now, can you fix that date by reference to your pawn records?

[fol. 203] A. Yes, sir; I have it on the book.

Q. What type of moving picture machine was it?

A. It is the kind these people take and go around and show in schools and things like that, 16-mm.

Q. Projector?

A. Victor machine, projector, and had a case and had a speaker.

Q. It had a sound speaker?

A. Yes; that is right.

Q. When was the next time you saw them after that?

A. Well, that is when—the next time I saw him and this other fellow, Bennett; Bennett pawned this watch.

Q. Was this during the day or night?

A. That was in the daytime.

Q. And did—that was how long after the visit with the moving picture machine?

A. About a week.

Q. Bennett pawned a watch, then?

A. Yes, sir.

Q. What type and kind of watch was that?

A. 17-jewel Hamilton, a round one.

Q. How much money did you give Bennett on the watch?

A. \$15.00.

Q. You run that through your pawn record?

A. Yes, sir.

[fol. 204] Q. You still have the watch?

A. No, sir.

Q. All right, now, when is the next time you saw him after they came in there with the watch—when Bennett and Jarrett came in there with the watch—when is the next visit after that?

A. The next visit is when he came with the Shortal jewelry.

Q. That was the day of the Shortal Robbery?

A. Yes, sir.

Q. About what time of day was that?

A. When they come in there?

Q. Yes, sir.

A. About 4:30 or 5:00 o'clock.

Q. In the afternoon?

A. Yes, sir.

Q. They pawned that with you?

A. Well, he wanted to sell that.

Q. Did you buy it from him?

A. Well, I didn't make a deal complete then.

Q. What was the substance of the conversation at the time he brought that jewelry to you? First, let me ask you, were both he and Bennett—Jarrett and Bennett—together?

A. Yes, sir.

Q. What was the substance of the conversation at that time?

[fol. 205] A. He said, he had this jewelry and wanted to sell it.

Q. He show it to you?

A. Yes, sir.

Q. Did he tell you where he had gotten it?

A. No, sir.

Q. You look at it?

A. Yes, sir.

Q. Describe that jewelry as best you can, Mr. Schwartz?

A. The solitaire ring, about a seven (7) carat stone, and had a lot of little diamonds around it, and the other was what you call a cocktail ring, a lot of baggette stones in it and two (2) bigger diamonds, about two and one-half (2½) carats each.

Q. Were there just two (2) pieces of jewelry?

A. That is right. Excuse me, there was a little wedding ring with a double row of diamonds all around it.

Q. In other words, there were three (3) pieces?

A. Yes, sir.

Q. When they came in there, which one—Jarrett or Bennett—had that jewelry?

A. I believe, I am not certain which one it was. I believe, it was Bennett.

Q. Where in the store did you talk to them?

A. Right there in front of my loan office.

Q. In your window there?

[fol. 206] A. Yes, sir.

Q. Were you behind the window?

A. Yes, sir.

Q. They came up to the window?

A. Yes, sir.

Q. One or the other—either Jarrett or Bennett—handed those three (3) pieces through the window to you?

A. Yes, sir.

Q. Now, then, what price did they ask for it?

A. Well, they asked me three thousand (\$3,000.00) dollars to begin with.

Q. And what did you tell them?

A. I told them, I couldn't say what I could give; I would have to look it over and estimate what value it had on it.

Q. And what did they say to that?

A. They said, 'Well, we will have to go somewhere; we will leave it with you and let you look at it'; and he said, 'Give us a couple of hundred (\$200.00) dollars and we will come back tomorrow and complete the deal', I believe it was.

Q. And what did you say to that?

A. I said, 'All right'.

Q. Did you give them some money?

A. Yes, sir.

[fol. 207] Q. How much did you give them?

A. Two hundred (\$200.00) dollars.

Q. You give them two hundred (\$200.00) dollars, both of them, or two hundred (\$200.00) dollars a piece?

A. No; two hundred (\$200.00) dollars together. I did the talking with one man.

Q. You remember which one that was?

A. I really believe that it was the fellow Bennett.

Q. Bennett did most of the talking?

A. Yes, sir.

Q. Jarrett was standing where he could hear?

A. Yes, sir. He was right with him.

Q. No doubt in your mind Jarrett heard everything that went on there?

A. I know, he did.

Q. Now, did you give the money to Jarrett or Bennett?

A. Well, I counted it out; I believe Jarrett taken the money, and they walked out together.

Q. You just handed it out through the window?

A. Yes, sir.

Q. Your recollection is not very clear which one got it?

A. I couldn't say; I believe the money—of course, they were both standing—have the window that is glass and have a cut hole in the place, and they were both standing right there at the window, and, and that is at the time Bennett took the watch out.

Q. Bennett bailed his watch out of pawn?

A. Yes, sir.

Q. He give you back some money for that?

A. \$16.50.

Q. \$16.50? Did the other man attempt to bail out the moving picture projector in pawn?

A. No, sir.

Q. Or anything else he pawned?

A. No, sir.

Q. Now, then, was there any other conversation at that time?

A. No, sir; not at that time.

Q. Now, when is the next time that you saw either one of those men?

A. The next day.

Q. Let me ask you, this was there—did they make any effort to contact you other than come by there? Did they send anybody?

A. No, sir; they called me—they called me and said, could I meet him somewhere and talk over what I would give them for the jewelry, I believe.

Q. When did they call you?

A. The next day.

Q. The next day—was it morning or afternoon?

A. I believe, it was in the morning.

[fol. 209] Q. Who called you—Jarrett or Bennett?

A. I believe, it was Jarrett.

Q. Jarrett and what did you reply to that conversation?

A. I told him—I said, 'I haven't had a chance to look the stuff over and tell you what I could give you for it'.

Q. Now, then, what did they say to that?

A. They said, 'We got to get out of town', and said, 'If you treat us right on these, we have got some more jewelry we will bring you'.

Q. Uh, huh, and what did you reply to that?

A. I told them, I would get to it just as soon as I could, and I said, 'You can call me back this afternoon and I will be able to complete the deal with you'.

Q. Now, then, was that about all of that conversation?

A. Yes, sir.

Q. When was the next time you heard from them?

A. That afternoon—that evening.

Q. They call you or come by?

A. I believe, they came by.

Q. Were you in your liquor store?

A. No; I was in the Pawnshop; it was before 6:00 o'clock.

Q. It was before 6:00 o'clock?

A. Yes, sir.

Q. Both of them come by—Jarrett and Bennett?

A. Yes, sir.

[fol. 210] Q. What did they say at that time?

A. Well, they wanted the balance of the money, and I think I told them right then—I said, 'I don't have the money and I would have to see what I could get out of the jewelry', and give them the rest of the money.

Q. Had you agreed upon a price for the jewelry at that time?

A. No, sir; hadn't agreed upon a price.

Q. Did you give them any more money at that time?

A. I think, I gave them fifty (\$50.00) dollars.

Q. A piece?

A. No; fifty (\$50.00) dollars to them.

Q. Just fifty (\$50.00) dollars?

A. Yes, sir.

Q. You remember which one you gave it to?

A. I believe, Jarrett got it.

Q. Now, then, when is—did they leave then?

A. Yes, sir.

Q. When is the next time that you either heard from them or saw them?

A. It was a couple of days afterwards that I heard from them.

Q. Now, let's see, they brought the jewelry in on the day of the robbery and you saw them the next day and gave them fifty (\$50.00) dollars and two (2) days later you heard [fol. 211] from them again?

A. That is right.

Q. You hear by telephone?

A. By telephone.

Q. Which one called you?

A. I believe, it was Jarrett; he called himself 'Jackie'; he never did use the name 'Jarrett'.

Q. 'Jackie' Lawrence?

A. No; he would just say 'Jackie'; he never would use any last name.

Q. Where did he call you from?

A. He asked me to meet him out here at a drugstore on Greenville Avenue and McCommas, I believe it was.

Q. You agreed to meet him?

A. Yes, sir.

Q. You got out there?

A. Yes, sir; I did.

Q. Was he out there?

A. They were both there.

Q. Both Jarrett and Hornett?

A. Yes, sir.

Q. What was the subject? Where did you meet him—in the car?

A. I drove up there; they were supposed to have been a little below the corner, and I didn't know where it was, and [fol. 212] I pulled in the drugstore there, and they must have saw me because they come from across the street and sit down in my car.

Q. Uh, huh. What was the subject of the conversation there?

A. They wanted the rest of the money, and I told them, I hadn't had a chance to do anything with it, and would have to wait a day or two to see what I could do.

Q. What did they say to that?

A. Well, they said, 'We got to have our money'; always wanted money.

Q. You give them some money at that time?

A. Yes, sir; I gave them one hundred (\$100.00) dollars.

Q. At that time?

A. Yes, sir.

Q. Now, was any other discussion at that time?

A. Well, if you hurry up and get through with this—still talking about some other jewelry; said it was 230-miles from here, meaning from Dallas.

Q. They say anything about this being the Shortal Jewelry?

A. No, sir; they didn't.

Q. Now, then, after that, where you went and met them in the automobile—when is the next time you heard from them or saw them?

A. Well, the next time was on Saturday.

[fol. 213] Q. On Saturday?

A. Yes, sir.

Q. Following Saturday?

A. Yes, sir.

Q. Did they come by then?

A. This fellow 'Jackie'—I was coming down Central Tracks there, from Main Street over to Elm, and he walked up behind me and said, 'Schwartz, we got to have our money'; he said, 'You been fumbling around with us'; and I said, 'Well, I tell you, you call me back in a little bit and I will have your money for you like that', and I called Will Fritz then and told him all about it; and he hadn't told me where he was when he saw me around there on Central Avenue and, so, we waited around until he finally called, and I was supposed to go meet him.

Q. You were supposed to meet who?

A. This 'Jackie'.

Q. Did you make a date to meet 'Jackie' at that time or did he call you on the telephone?

A. He called me but Captain Fritz was waiting to meet him.

Q. After you saw—after he came up to you on the streets, you contacted Captain Fritz?

A. Yes, sir.

Q. Then, after that, did 'Jackie' contact you by telephone?

[fol. 214] Q. Did you arrange to meet him by telephone?

A. Yes, sir.

Q. Where did you arrange to meet him?

A. I didn't arrange to meet him; he told me where to come meet him.

Q. Where did he tell you to meet him?

A. Haskell and Live Oak.

Q. You convey that information to Captain Fritz?

A. Yes, sir.

Q. And, then, Captain Fritz went out and made the arrest?

A. Yes, sir.

Q. Now, then, when—was that Saturday of the arrest?

A. Yes, sir.

Q. Now, then, now at the time he saw you on the street, where had you been?

A. I had been down at the City Hall.

Q. How long had you been there?

A. I had been there twelve (12) hours.

Q. You had been under questioning by Captain Fritz at that time?

A. Yes, sir.

Q. At that time, state the substance of what you told Captain Fritz during that questioning period?

A. I told him, I would get the Shortal jewelry for him and get the thieves also.

[fol. 215] Q. You tell him at that time that you had the jewelry?

A. Yes, sir.

Q. He go get it from you?

A. Yes, sir.

Q. Now, how did you happen to be in jail, Mr. Schwartz?

A: Well, Friday evening when I went down there to talk to him, he said, he didn't like the way I was doing; said, I was trying to run the Police Department; I said, 'I ain't trying to run no Police Department', so, the first thing, he did, the Officer, he sent up there to get me, he said, 'Just take him back there and hold him for investigation of robbery', I believe is the way, he put it.

Q. When did you tell him you had the Shortal Jewelry?

A. That following morning; that was Friday.

Q. You stayed in jail that night? (March 3rd)?

A. Yes, sir.

Q. The following day you told him, you had the jewelry?

A. Yes, sir.

Q. You know who fingered you in this thing, Schwartz?

A. No one fingered me. I told Captain Fritz about it.

Q. You told him that?

A. I told Captain Fritz about it.

Q. Now, then, did you tell him the full details at that time?

[fol. 216] A. Yes, sir.

Q. To get the timing on that, you stayed in jail Friday night before the arrest on Saturday?

A. Yes, sir.

Q. And it was on Saturday morning that you told Fritz that you had the jewelry and who the people were?

A. Yes, sir.

Q. That sold it to you?

A. Yes, sir.

Q. Now, had you communicated before that Friday—had you communicated in any way with Captain Fritz?

A. No, sir.

Q. So that from the time of the robbery until Friday before the arrest you had not communicated with Captain Fritz?

A. No, sir.

Q. Had you communicated with any Police Officers?

A. No, sir; no Police Officers.

Q. Had you communicated with anybody about the jewelry between the time they brought it to you and Friday before the arrest?

A. Yes, sir.

Q. Who did you communicate with?

A. Mr. C. E. DeWitt

Q. C. E. DeWitt?

A. Yes, sir.

[fol. 217] Q. What is his full name?

A. I don't know; just C. E. DeWitt; he is Insurance Adjuster.

Q. When did you see Mr. DeWitt?

A. Oh, about four (4) or five (5) days before I saw Captain Fritz.

Q. All right and what was the subject of that conversation?

A. Well, I read in the papers about it being forty thousand (\$40,000.00) dollars worth of jewelry; I figured the difference in the price that it could be bought for and the money that could be gotten; I asked him, was there forty thousand (\$40,000.00) dollars insurance and what he was able to pay for it back, if he wanted it; and he said, 'There isn't no forty thousand (\$40,000.00) dollars worth, Schwartz'; he said, 'There is about fifteen thousand (\$15,000.00) dollars worth'; and, so, dickering around there and the difference of the fourteen hundred (\$1,400.00) dollars and what they wanted for it, there was a few days lapse that I didn't explain it all to Captain Fritz.

Q. Did Mr. DeWitt offer to buy the jewelry from you?

A. No, sir; he said, he would pay the Reward of ten (10%) per cent.

Q. Ten (10%) per cent of the value of the jewelry?

A. Yes, sir.

[fol. 218] Q. Which would be ten (10%) per cent of fifteen thousand (\$15,000.00) dollars?

A. I think, he said; it was fourteen thousand (\$14,000.00) dollars.

Q. He could pay you fourteen hundred (\$1,400.00) dollars?

A. Fourteen hundred (\$1,400.00) dollars.

Q. He offer to pay you that?

A. He didn't offer to pay me anything; that is what he could pay.

Q. Now, did you offer to sell him the jewelry or return it to him for fourteen hundred (\$1,400.00) dollars?

A. Never did say no more to him.

Q. Did you contact anybody else about the jewelry?

A. No, sir.

Q. Did you contact a Mrs. Graham?

A. Who?

Q. A Mrs. Graham?

A. I don't know a Mrs. Graham.

Q. From the time of the robbery up until the time of the arrest on Saturday, did you ever—did you call the Shortal Clinic?

A. No, siree.

Q. Did you make any effort to contact the Shortals?

A. No, sir.

Q. You write them any letters?

[fol. 219] A. No, sir.

Q. You state positively that you did not talk to Mrs. Graham, or anybody else in the Shortal Clinic, about the jewelry, with regard to money?

A. No, sir.

Q. Now, Mr. Schwartz, do I understand your testimony that you sold two (2) pistols? Did you get the first pistol back when you sold the second one?

A. Yes, sir; he traded it back.

Q. When was that transaction? He paid you \$15.00 for the first pistol?

A. Yes, sir.

Q. He traded back to you and what did you sell him the second pistol for?

A. \$25.00; he give me \$10.00 difference.

Q. Is that all the pistols involved?

A. Yes, sir.

Q. There was no more pistols?

A. I don't believe there was, sir.

Q. Now, Mr. Schwartz, think hard on that—are you sure there were only two (2) pistols sold?

A. The best of my knowledge, there was only two (2).

Q. To the best of your knowledge, there was only two (2)?

A. Yes, sir.

Q. If there was more than that, would your records show it?

[fol. 220] A. Yes, sir.

Q. You, now, did you have any conversation with Jarrett or Bennett before this Shortal Robbery, about jewelry?

A. No, sir.

Q. Did you have any conversation with Jarrett or with Bennett about Mrs. Shortal having a lot of expensive jewelry?

A. I don't even know Mrs. Shortal or Doctor Shortal either.

Q. You know where they live?

A. I do not, sir, only what I read in the papers since this robbery.

Q. Mr. Schwartz, we will issue you a Subpoena Duces Tecum for those records and ask you to go with the Grand Jury Bailiff and get your books and Register of the Pistols and also the Pawn Information on these pistols, in order to fix that time, and ask you to return with him. You can do that voluntarily or we can issue you an attachment and have you do that but it would be better if you do that voluntarily.

A. I will do that voluntarily.

Q. We will issue you a Subpoena Duces Tecum. Just wait outside in the room. What about the motion picture camera?

A. The Police Department have that—turned it over to them.

Q. Now, one other question, Mr. Schwartz, when did you find out that these were the Shortal Jewels you had?

[fol. 221] A. I believe, the next day.

Q. The next day after they were brought to you?

A. Yes, sir.

Q. All right, now, if you will wait over here in the witness room—when did you learn the real names of these persons?

A. These thieves—I learned it down at the Police Station. I never did actually know their names.

Q. All right, you wait out there in the witness room.

Q. Now——

A. I just brought along this first gun they traded back.

Q. Well, have a seat there and I will ask you about those. State your name, please?

A. T. J. Schwartz.

Q. You are the same T. J. Schwartz that testified here just a few minutes ago, are you not?

A. Yes, sir.

Q. And you were sworn and warned of your rights at that time?

A. Yes, sir.

Q. All right, now, then, speak a little louder, Mr. Schwartz. Have you been to your place of business in response to the Subpoena Duces Tecum and looked through the records?

A. Yes, sir.

[fol. 222] Q. Did you find those records?

A. Yes, sir.

Q. What records did you find?

A. I brought the record of the pawn of the watch and record where the pawn of the gun was, also.

Q. Which gun was that?

A. That automatic.

Q. The first one you sold him?

A. No, sir; the second one.

Q. The second one? Will you get your record and let's look at that, Mr. Schwartz? Now, you have a pistol out there—is that the first pistol you sold him?

A. Yes, sir.

Q. Describe that to the record, Mr. Schwartz?

A. 38-Eastern Arms.

Q. All right, will you put that up on the shelf there? Now, look for your records that you have on the pistol.

A. Well, here is that automatic, the day it was pawned by a fellow by the name of Bob Burk. That is the man that originally——

Q. What was his name?

A. Bob Burk.

Q. When was that pawned with you?

A. May 23rd, 1949.

Q. What did you give him on that?

[fol. 223] A. \$10.00.

Q. You have a description of it?

A. No, sir. I know what it was.

Q. You know, that is what it was?

A. Italian Brevetti and I can get a hold of the man that pawned it, if you want it.

Q. You have a record of the date you sold that to Jarrett or Bennett?

A. Well, I was looking there and Mr. McGuire seemed to be in a hurry to get back and, so, I just brought the last book. I will have to go through it to find it.

Q. It would be in that book?

A. We have another one just like it but I am pretty sure it is in this one; I just brought it along with us.

Q. Do you remember the name, he used when you sold him that gun?

A. No, sir; I don't.

Q. Does this book contain a description of the type and kind of gun?

A. Yes, sir; usually.

Q. February of 1950?

A. Yes, sir; that is what we want to look for.

Q. Now, this book that you have here, you enter those sales in chronological order?

A. Yes, sir; as a rule, we do. We rent Tuxedos and use [fol. 224] that same book for that, you will notice.

Q. What does 'X' mark mean?

A. Those are the Tuxedos that are returned; we just scratch them out.

Q. You sell all of your pistols—you enter all of your pistols sales in this book?

A. Yes, sir; more than likely. We have another one also.

Q. You have another one also? I don't find any entries on pistols for February—February 25th?

A. That was to a lady that lives at Wylie, Texas.

Q. That was before that—it should be back this way?

A. That is right; it must be in another book; I thought it was in this one; we just picked it up and come on.

Q. It would be in this book or the other one?

A. Yes, sir; in a book similar to that one.

Q. We will need that. Will you—the Grand Jury Bailiff will go back with you and, if you give it to him, it won't be necessary for you to return.

A. Yes; I will give it to him. In these books here—

Q. What is this book?

A. This is regular Pawn Book here; here is that camera in here and also that watch you ask about.

Q. Give us the number of the Pawn Ticket on the camera?

A. All right, sir; use the ticket No. 10461.

Q. 10,461? Does that show the man's name? Talk a little [fol: 225] louder. Does that show the man's name that pawned it?

A. Yes, sir.

Q. What is that name?

A. L. C. Stewart.

Q. Is that name that Bennett used for that?

A. Jarrett.

Q. Jarrett?

A. Yes, sir.

Q. That date is what?

A. 2/1.

Q. 1950?

A. Yes, sir.

Q. That is Pawn Ticket Number 10,461?

A. Yes, sir.

Q. Let's go to the watch?

A. The watch, I think, is in this other book here, several days later. This is Bennett that pawned the watch the 2/10, 1950.

Q. He use the name 'Jimmie' Stewart?

A. Yes, sir.

Q. That is Pawn Ticket Number 10,150?

A. Yes, sir.

Q. All right, Mr. Schwartz, we will ask those books be left until we can reproduce those and we will return them to you.

[fol: 226] A. That is all right.

Q. The Bailiff will go back with you?

A. All right, sir.

Q. And pick up other book, in which the pistol is registered?

A. Yes, sir.

Q. As I understand it, you registered all pistols sales in this book you have here, or the one you are going to give the Grand Jury Bailiff?

A. Yes, sir.

Q. And it will be registered in the other one?

A. Yes, sir.

Q. All right, now, is there anything else, Mr. Schwartz, that we haven't gone into that you want to tell the Grand Jury about this matter?

A. No, sir; not anything that I know of particularly unless there is anything that they would like to ask me.

Q. Does any Member of the Grand Jury have any further questions on this matter? All right, let's get the Bailiff in here.

A. You remind me one time, they had me as a witness for a man shooting his wife. He bought a gun down there and he was plain crazy. It was back several years when guns weren't quite so high, and I asked \$15.00 and, so, the District Attorney asked me, 'How much you sell the gun [fol. 227] for?', and I think, I sold it to him for \$8.00, or \$9.00; he said, 'He ain't so crazy; he knew how to jew the price down'.

Q. Let me ask you, do you know what has happened to the other pistol that you sold him?

A. I understand that Captain Fritz has it.

Q. Has the other pistol?

A. Yes, sir.

Q. All right; I think that it is all, Mr. Schwartz."

(Reporter's Note: All questions asked the Defendant before the Grand Jury on date shown were asked by Hon. Will R. Wilson, Jr., then Criminal District Attorney, Dallas County, Texas.)

MISS KATE GRAHAM, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to wit:

Direct examination:

By Mr. Wade:

My names is Kate Graham; I work for Doctor W. W. Shortal out at his Clinic; my title is that of Business Manager there; my name is "Miss" Graham and I am a [fol. 228] sister of Mrs. Shortal.

I do remember the date that my sister was robbed, February 17th, 1950. At that time I was living at No. 4806-Swiss Avenue, Dallas; that is an apartment house owned by the Shortals; it is some olocks down from the Clinic.

On the morning of this robbery I did receive a telephone call from someone concerning an accident to Mrs. Shortal; this call was received about 10:30 o'clock A. M. that morning. The nature of that call was that they wanted to know where they could locate Doctor Shortal, and I told him that Doctor Shortal wasn't in; that he was at the hospital, and he wanted to know, if they were to come by, could they see Doctor Shortal; I said, "If it is for business, I will help you; if it is professionally, you see Doctor Shortal"; I asked him what he wanted; he said that Mrs. Shortal had backed into him and had bent up his car—dented up his car—and that she had not told him where to go and have it fixed and he wanted to know where to go; I told him that Doctor Shortal could let them have it sometime that afternoon late; he said, "Don't get alarmed; that accident wasn't serious"; I said, "Where was it?"; he said, "Out on Gaston Avenue"; and I wanted to know his name; I asked him to leave his number and that I would call them; he said, "I cannot leave a number".

At the time of this robbery I was there at the Shortal Clinic.

[fol. 229] Sometime after the robbery I did receive another telephone call concerning the jewels; the robbery was on February 17th, 1950, and this second conversation took place about 10:30 o'clock in the morning on Friday,

March 3rd. In this conversation the nature of it was that they wanted to get in touch with Doctor Shortal and I told him that it would be difficult to reach Doctor Shortal at that time; I asked him if he would talk with me; he said, "No; I want to talk to him about the jewelry; I want to know if there is a Reward offered for the jewelry"; I said, "I don't know; I have never heard them discuss that. I would like for you to leave your phone number so that we can get in touch with you"; he said, "I cannot do that".

This call came to me about 10:30 o'clock A. M. on that morning and I immediately called Captain Fritz's office and I talked with Captain Fritz; immediately after I called Captain Fritz I called another number; I don't recall the phone number now but it was Tommy Schwartz's place; he answered the phone, "Day & Night Pawnshop"; I asked him who was talking and he said, "Tommy Schwartz"; I asked him who was talking and he said, "This is Tommy Schwartz".

The import of that conversation is that I told him that I had a ring that I wanted to pawn, that I needed some money, my boss lady was out of town; he asked me my name; I told him that it was "Mary Smith"; I asked him how much he could loan me, that I needed some money; he said, [fol. 230] "Bring it down here and let me look at it", and I told him that I would. This last conversation was immediately after my conversation with a caller about the jewelry; it was a matter of minutes.

I will tell this jury that the voice that answered that phone as Tommy Schwartz at the Day & Night Pawnshop was definitely the same voice that had asked me about a Reward for the jewelry; I recognized that voice as being the same voice. There was only a matter of minutes between them.

Cross-examination.

By Mr. Hughes:

This is the third time that I have testified in this case. With reference to my not testifying in this case the first time about these conversations, I will say that I was not

asked about them; they were not fresh on my mind at the first trial.

This last conversation that I have just talked about where somebody talked to me about a Reward and wanted Doctor Shortal and about a Reward on the jewelry was on March 3rd, 1950, and the robbery occurred on February 17th, 1950.

Re-direct examination.

By Mr. Wade:

Mr. Hughes did not ask me about that on previous trials, [fol. 231] of this case; I testified to this on the second trial just like I did here; I was not asked anything before.

Re-cross examination.

By Mr. Hughes:

Defendant did not put me on the witness stand.

(Witness excused.)

The State rests.

THOMAS SCHWARTZ, the Defendant, called by his counsel in his own defense; having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Hughes:

My name is Tom Schwartz; I live at No. 4432 Stanhope Street, here in the City of Dallas, Texas. I have lived in Dallas for 44 years; I am 44 years old; I have lived in Dallas all of my life.

I am a married man; my wife and I live at No. 4432 Stanhope Street, Dallas. I also have a son who is 19 years old; he is in school here in Dallas in the Highland Park High School.

[fol. 232] I have been in the pawnshop business all of my adult life, ever since I was big enough to work; my father was in that business before me; I have followed my father

in this same business; when my father retired I just took over the whole outfit.

The name of my pawnshop was the Day & Night Pawnshop; it was located at No. 2408-Elm Street. Taking into consideration the general run of pawnshops here in Dallas, my pawnshop was a pretty large establishment. We handled guns, watches, jewelry, radios, cloth and everything in that pawnshop of mine.

There I handled merchandise other than that that was taken in pawn there and sold. I had nearly a complete line of furnishings, guns, ammunition, jewelry, baggage luggage and what not; I made loans there on anything of value. I will say that I have been in the pawnshop up there on Elm Street about twenty-eight (28) years.

I am not in the pawnbroking business now; I sold out; I am not in any kind of business right now, just buying and selling fixtures and things like that, trading a little bit.

During the twenty-eight (28) years that I have been up there I have been charged at times with Receiving & Concealing Stolen Property, that is, buying property that had been unlawfully acquired. In 1940, 11-years ago, I was charged with Receiving & Concealing, a Misdemeanor, under \$50.00; it was later dismissed, in 1942.

[fol. 233] On July 1st, 1942, I was charged with Receiving & Concealing and that case was dismissed; that was also Receiving & Concealing Stolen Property.

On December 20th, 1946, I was also charged and that was dismissed.

In 1950, after this indictment and in connection with this matter, I was again charged with Receiving & Concealing Stolen Property; that indictment has been there for a year and that case has never been set for trial.

In my pawnshop business I bought and sold many articles.

Besides being in the pawnshop business I had another business; I had a liquor store there in connection with my pawnshop; I operated that liquor store for about a year.

Here recently I was charged in the Federal Court in reference to purchasing liquor on another man's Permit, which constitutes some character of an offense under the

Federal Laws with reference to their records. I admitted that offense in the Federal Court and I have never been sentenced yet for that offense.

Outside of that Federal matter, which hasn't been disposed of yet, I have never been convicted and served a jail sentence or been to the penitentiary for any offense in my life.

I have seen this man Jarrett that testified here yesterday [fol. 234] and this morning before; also I have seen this man Bennett; I learned that his name was Bennett; I knew Bennett while he was here with Jarrett. I guess, the first time that I ever saw either Jarrett or Bennett was around the latter part of January or right around the first or second of February, to the best of my knowledge, 1950.

I first came in contact with Jarrett at the time that he came in with Wanda Guy; Wanda Guy is a girl that I knew many years ago when I went to the Lamar School; Jarrett came into my pawnshop there with this woman named Wanda Guy; Jarrett was with Wanda Guy at that time; Jarrett and Wanda Guy came in there alone.

I then had business dealings with Jarrett and Wanda Guy; Wanda Guy said that she wanted to buy a little, cheap watch; I showed her one for \$15.00; she said that she only had \$10.00, so, I started to reach into the case there for a cheaper watch; at that time Jarrett had introduced himself as "Lawrence"; Jarrett stepped up and said, "Wanda, why don't you go ahead and take that watch; I will let you have \$5.00; you buy that one"; he handed her the \$5.00 and she turned and she handed me \$15.00 for the watch.

Wanda Guy, then, said, "My friend here wants to buy a little gun, any kind of a little gun, a little cheap gun, for house protection; he don't care whether it will shoot or not; just something to scare somebody". Jarrett, then, stepped up and said that he would like to see a little, cheap [fol. 235] gun; I said, "All right, let's step back to the gun case and I will show you"; he said, he didn't want to put too much in it, he didn't care if it would shoot, just trying to scare somebody around the house, and he came up there, and I reached into the case there and I got a gun for \$20.00, or something like that; he said, no, that he wanted a cheaper gun, so, I reached in there and I got

that (indicating State's Exhibit, No. 1) gun out, the one right there.

I then had a lot of guns up there that I had taken in pawn; that (indicating State's Exhibit, No. 1) is the first gun that I showed to Jarrett. I showed Jarrett that (indicating) gun there, the one that you have there, for \$15.00, which is a pretty fair gun if you are looking for a cheap, little gun, and Jarrett took that gun and he paid me for it; I wrapped it up and Jarrett went out with it.

The next time that I saw Jarrett was about the next day or the day after—I cannot be certain—Jarrett came back in there and he said, "That gun that you sold me won't fire; it's off center"; I didn't understand what he meant by being off center; I said, "Well, I told you that that was a cheap gun; you told me that you didn't care whether it would shoot or not, that you wanted something mostly to scare somebody"; I said, "If you want a better gun, I have got them in here; they will cost you a little difference"; Jarrett said, "Let me see it"; I looked around [fol. 236] my case or we looked in the case together there and Jarrett said, "Let me see that automatic", which is one of those automatics there on the table; (counsel puts his hand on one) that is not the "gun"; it is the other one (indicating State's Exhibit, No. 2); that one (indicating).

That (indicating State's Exhibit, No. 2) is the gun that I showed Jarrett after Jarrett wanted to give me this one (indicating State's Exhibit, No. 1) back because it wouldn't shoot. I said to Jarrett, "This gun here will cost you \$25.00; if you want to pay \$10.00 difference", and that I would take back the first gun that I had sold him; Jarrett said, "Well, how do you know that that gun will shoot?"; I said, "We will get the boy to take it upstairs and fry it out", which I did; I said to Jarrett, "You listen and you will hear the report"; the boy went upstairs—I gave the boy a couple of shells and the boy fired it out of the window on the third floor in the air and I heard it; I said to Jarrett, "Do you hear that? That works all right"; Jarrett said, "That works pretty good"; the boy came on down and he said, "That is the gun that Mr. Schwartz had me to try

out"; and I said, "If this gun suits you, it will cost you \$10.00 difference", so, Jarrett gave me the ten (\$10.00) dollars and Jarrett took that gun (indicating) and I took that one (indicating) back and put it on the shelf; Jarrett then left.

I brought this (indicating State's Exhibit, No. 1) gun [fol. 237] down to the Grand Jury voluntarily and I gave it to them.

The next time that I saw either Jarrett or Bennett was when Jarrett came in there and sold me a little overnight case for \$10.00; that overnight case was introduced in evidence here on the first trial and it is available now if somebody will go out there and get it, if the jury wants to see it.

The next time that I saw either Jarrett or Bennett was one night when I was in the liquor store about 8:00 o'clock P. M. or, maybe, just a little after, when a man, which was Jarrett, started into the store there with a talking machine thing; I said to him, "You cannot come in here with all of that. What have you got?"; Jarrett said, "I have got a moving picture machine here and I want to borrow some money on it"; I said, "Wait a minute; I will have to go inside to the pawnshop, through the other entrance"; picked up out of the liquor store and went into the pawnshop and Jarrett undid the cover of the case and he showed me the moving picture machine; and Jarrett was wanting to borrow one hundred (\$100.00) dollars on it; I said, "I don't know much about this thing here"; I told Jarrett then, "I don't know much about these sound picture machines; I don't think that I can let you have a hundred (\$100.00) dollars"; I said, "I will loan you \$40.00 on it if you want it"; Jarrett said, "Can you let me have \$75.00?"; he said, "I need just a little more than that \$40.00 before I get my expense check"; Jarrett said that he was a Salesman and used this machine in his business; [fol. 238] so, I said, "No; I don't know much about this thing", fearing that it was an old model, I think, from the way that it looked, from the case but I said, "If you want \$40.00, that's all that I can do; I will take the machine"; Jarrett said, "All right; give me the \$40.00"; I let him have

the \$40.00, and Jarrett left. I gave him a pawn ticket for the machine.

I would say that ten (10) days or two (2) weeks had elapsed from the time that Jarrett and Wanda Guy first came into my pawnshop that day and she bought a watch and Jarrett bought a gun and the time that I let Jarrett have the \$40.00 on this moving picture projector.

The next time that I saw Jarrett and Bennett was the time that Bennett pawned his watch to me for \$15.00; they came in there one afternoon and Bennett stepped up and said that he wanted to borrow \$15.00 on his watch; Jarrett and Bennett were in there together at that time; I had never seen this Bennett before. I looked at Bennett's watch and I said, "I can let you have \$15.00 on the watch", so, I rang it up; Bennett said that he had a crystal broke and said, if I didn't mind, he wanted me to have the crystal fixed on it, so, I said, "All right, I will do it"; so, after I made the loan, had completed it, Bennett said to me, "I am having a little domestic troubles with my wife"; seems like going to get a divorce; Bennett then said, "She has got some nice jewelry and I would like to get it back", he [fol. 239] planned that; Bennett wanted to know if I would be interested in buying it; I said, "Yes; that's my business; bring it in, whatever it is; then, I can tell what I can give you for it".

I made a pawn ticket on that Bennett watch and I wrote it up. I believe that Bennett gave me the name of Stewart; I don't remember whether Bennett signed as T. J. Stewart or not but, anyway, it was Stewart. That was the name used in sending the \$50.00 to Houston to Miss Kendrick.

Bennett did ask me then if I would have a new crystal put on his watch and I said that I would; I charged \$1.50 for the crystal. There was a ticket for \$16.50 which showed where the other dollar and a half (\$1.50) came from.

When Bennett hocked his Hamilton watch in my pawnshop for that \$15.00 that was the first time that I had seen Bennett. The next time that I saw Jarrett or Bennett is when they both came in there with this jewelry that I have spoken of here. They came in my pawnshop around 4:00 o'clock P. M., I guess, or a little closer to 5:00, to the best

of my knowledge, and they handed me this jewelry, a lady's wedding ring and a lady's solitaire ring, about 6-carats, and a kind of a cocktail ring with diamonds in it and little odd stones around it. I think, they call them baggettes.

So Bennett then said to me, "This is the jewelry that I was talking to you about", so, I looked at it, and I said, [fol. 240] "What do you want for it?"; "Well, what will you give for it?"; I then said, "Kind of dull! I couldn't hardly determine what it is; I haven't looked at this big stone; this thing here don't look like a diamond, kind of yellow, off color"; I said, "I will have to wait until in the morning to look it over and, then, I can tell you what I will give you for it"; he said, "Have you got a little money?"; he says, "Let me have a couple of hundred (\$200.00) dollars now and we will come back and see you in the morning", so, I gave them two hundred (\$200.00) dollars and they left.

Bennett did take up his watch; when I gave Bennett this money he said, "I will take out my watch". I deducted the \$16.50 from the two hundred (\$200.00) dollars; Bennett handed me back a \$20.00 bill and I took the pawnticket out of that.

The next morning I got hold of a man by the name of Fink, that was down here, that buys diamonds; he deals in diamonds, so, I called him to come over and look at them; Mr. Fink came over and he said, "I will have to weigh them up and everything to tell you what they are worth and take them back to Chicago"; that is where he lives; he was going to look these rings over, then, he was going to send an appraisal of what I could give for them.

I have been knowing Mr. Fink for about 15-years now; he is a man in the diamond business; his address is No. 5-South Wabash, Chicago, Illinois. I know of my own knowledge that Mr. Fink does business with diamond dealers [fol. 241] here in Dallas, Texas. Mr. Fink consigns diamonds that he carries with him; I can give you the names of the places that he does business with if you want me to; Mr. Fink buys diamonds and leaves them with dealers on consignment to show to their customers; I have shipped diamonds and bought diamonds from that address through the years.

I had a conversation with Fink with reference to handling these diamonds; this conversation was the next afternoon after Jarrett and Bennett had turned this jewelry over to me; I talked to Mr. Fink, the diamond dealer, that next afternoon; Mr. Fink was in Texas, then, buying diamonds; he was staying at The Texas Hotel, Fort Worth, Texas.

I did turn those diamonds over to Mr. Fink there; we agreed that Mr. Fink would look the diamonds over and see how much they weighed and, in fact, Mr. Fink was going to try to broker them to some other dealers up there; then, Mr. Fink was going to write me a letter and tell me what he could give for them.

✓ In the diamond trade these diamonds are bought by color and size; you have to weight them to determine how much you are to pay for them; you buy them by the carat; you have to weight these diamonds outside of their mountings, loose; you have to remove their mounting to weigh them; the color and the size is what determines the cost. [fol. 242] When Mr. Fink left here, he was going out in his territory, what he called "making the rounds" in South Texas, to San Antonio, Houston and Corpus Christi, where he would call on the diamond trade, buying and selling diamonds. I know some of the dealers that he calls on.

When Jarrett and Bennett left the diamonds with me and I gave them the two hundred (\$200.00) dollars, less \$16.50 to pay the watch out and to pay the \$1.50 for the repaired crystal, I believe that the next time that I saw either Jarrett or Bennett was on Monday because they called me, I believe, on Saturday, and they asked me, and I told them, "No", that I had been busy and hadn't had a chance to do anything about it, to look at them. I had not told Jarrett or Bennett that I had turned these diamonds over to Mr. Fink; I didn't tell Jarrett or Bennett anything about who I turned the diamonds over to.

I got those diamonds from Jarrett and Bennett somewhere around 5:00 o'clock on Friday, February 17th, 1950, and I turned them over to Mr. Fink around noon on Saturday, February 18th, 1950.

The first time that I knew or discovered that these were the stolen diamonds or had any suspicion that they were the stolen diamonds that came from the Shortals was that

evening; I closed my liquor store at 10:00 o'clock, so, I met my wife to go home and we always stop out in Oak Lawn to get coffee and pick up a newspaper there in Oak Lawn and Cedar Springs Road and, then, we went home; this was [fol. 243] not the night of the robbery; it was the night following the robbery, which was Saturday night. I had worked Friday night in the liquor store. I bought the Dallas Morning News that next day, Saturday. I learned from the newspapers, read them and suspicioned that these were the Shortal diamonds after I had turned the diamonds over to Mr. Fink.

It was about 11:00 o'clock, or maybe a little later, when I had gotten ready for bed, had taken my bath, so, I picked up the newspaper and I saw this article about these Shortal diamonds, so, according to the description, I just knew that they were the Shortal diamonds.

When I had read the description of these diamonds and I knew that they were the diamonds that I had taken from these men, I immediately got up and called The Texas Hotel, in Forth Worth, to see if Mr. Fink was there, and they said that he had checked out during the day.

With reference to my making any effort to locate Mr. Fink and recover these diamonds, I will say that on Sunday I went to Fort Worth and I made an inquiry at The Blackstone Hotel and the Blue Bonnet—not the Blue Bonnett—I mean The Worth Hotel, and Mr. Fink wasn't there; I went back to The Texas Hotel and asked the Clerk there if Mr. Fink had left any forwarding address or anything.

I found out from the Clerk there that Mr. Fink had [fol. 244] probably gone to San Antonio, and I called down there to the Saint Anthony Hotel and another leading hotel there, and Mr. Fink was not registered there. On Monday I called Shurlopp Brothers, San Antonio, diamond dealers that Mr. Fink does business with, and they said that Mr. Fink hadn't gotten down there.

The next time that I saw Jarrett or Bennett after my trip to Forth Worth and found out that Mr. Fink had gone to San Antonio and following my having given them two hundred (\$200.00) dollars and taken out the \$16.50 was, I believe, when Jarrett and Bennett came in there Monday morning, around noon time, and said, "What have you to

say that you will give for them?"; I said, "I haven't had a chance yet to look at them thoroughly and to tell you what I can do". I think that I gave them a hundred (\$100.00) dollars on that occasion; as to whether I gave them that money between them or each, I will say that I just laid the hundred (\$100.00) dollars out and, I think, Bennett picked it up, I think, he turned and walked out and Jarrett went with Bennett.

The next time that I saw either Jarrett or Bennett was on Wednesday; Jarrett called me on the telephone and says, "I want you to come out here on Greenville Avenue and McCommas and we will meet you in front of this drugstore"; Jarrett said, "Bennett is pretty drunk and I cannot bring him down there, and we want our money", so, I said, "Okay, I will be out there in about an hour". I did go out [fol. 245] there and meet Jarrett and Bennett.

I drove up out there in front of this drugstore and they came around the corner and got in the car; Jarrett got in the front and Bennett got in the back, and Bennett started out raising sand and he said, "I am getting tired of this fourflushing around; give us our money for this jewelry". I said, "Well, I will tell you, I cannot give you any more money after this; one thing, I believe that these are the Shortal diamonds"; Bennett says, "Well, if it is, you are already in it". Bennett did not say that they were not the Shortal diamonds; Bennett didn't say that they were; we sat there talking a minute and Bennett said, "Well, you know, you got them?"; "Yes", I said, "You are the guy that let me have them."

Bennett went on there and I decided that I would let them have a little money so that they would not get mad. I think, I had \$80.00 in my pocketbook; I gave them the \$80.00 and told them that I would get the rest of the money.

After I knew that I had received and concealed and had learned that I had stolen property in my possession and that I had turned it over to Mr. Fink, at that time, I did not tell the Police Officers about it because, well, Mr. Fink was a man about 65-years old and I just knew that if they were to come up and say anything about arresting him—I wanted to get the diamonds back, first, myself, and turn them over to the Police.

[fol. 246] With reference to my feelings toward these men, Jarrett and Bennett, after I knew that those were the Shortal diamonds and that I had had them, I will say that I was pretty well scared, afraid that they might kill me if I didn't do what they said.

All of this time I was trying to get the diamonds back; I called down at New Orleans and I went up where Mr. Fink said he was going but I didn't contact him. I tried to contact Mr. Fink in his office in Chicago and I called at his home and I talked to his wife; I learned from there when Mr. Fink would return to Chicago, to his office, with these diamonds.

I had given Jarrett and Bennett two hundred (\$200.00) dollars and had given them one hundred (\$100.00) and I think that I gave them \$80.00 out there on Greenville Avenue; I gave Jarrett and Bennett money after that; at that time I ran into Jarrett downtown and every time that Jarrett would see me he was always wanting money; Jarrett then asked me for a hundred (\$100.00) dollars; I told him that I couldn't spare it; he then said, "Let me have \$50.00"; I said, "I sent your partner \$50.00, too", so, I called the store and told the boy, Hubert, to give Jarrett \$50.00, and Jarrett went by there and he got the \$50.00.

I saw Mr. DeWitt testifying here. At no time after I received these diamonds and turned them over to Mr. Fink [fol. 247] did I have a conversation with Mr. DeWitt after I went to his office that one time; I did go to Mr. DeWitt's office one time; I went up there to see Mr. DeWitt to see how far I could go along with these fellows about these diamonds, how much I could keep paying them along so that I wouldn't be out any money until I recovered the diamonds, got them back from Chicago; Mr. Fink, rather, was supposed to be in Chicago.

I did not demand any kind of a Reward from Mr. C. E. DeWitt; I did not tell Mr. DeWitt that I had these diamonds in my possession. When I went up there I first told Mr. DeWitt that I had had a phone call, that somebody had called me and told me would I be interested in buying some "big pieces", big diamonds; I said, "Yes; I will buy them but I will have to see them", so, he said, "Well, we will call you back about 4:00 o'clock and see if we can

meet you"; so, after I got the call, that's when I called Mr. DeWitt; I told Mr. DeWitt about it and he said, "Can't you come up here and talk to me about the diamonds?"; I said, "Yes"; I went up there and I told him about this phone call; Mr. DeWitt said, "I have got a loss of some big diamonds; it might be those", and Mr. DeWitt got the description out and showed it to me.

Mr. DeWitt was talking there about the Shortal diamonds. I did not swear Mr. DeWitt to secrecy; there was nothing secret about the matter when I was talking to him to see if I could get a Reward. My intention about these diamonds, after I got them back, was to turn them [fol. 248] over to the Police Department here. I did eventually get the diamonds back and I turned them over to the Police. I hadn't turned these diamonds over to the Police Department sooner because I hadn't had the diamonds in my possession and I wanted to be sure to get them back because I knew that by stringing these fellows along we weren't hardly going anywhere.

I would say that I gave Jarrett and Bennett altogether up to the time that I got the diamonds back around five hundred (\$500.00) dollars, maybe, six hundred (\$600.00) dollars.

I don't know where Bennett went; I got a phone-call from Houston and I sent him some money down there. While Jarrett was in Greenville I got a call from him there. I had given Jarrett and Bennett this money all along.

During all of this time I was making every effort possible to locate Mr. Fink and get the diamonds back. I certainly was doing that.

On the day before Jarrett was arrested here I was taken to the City Hall but I was not questioned there by Captain Will Fritz, Captain of Detectives. When the Police Officer came up there and got me he told me that Captain Fritz wanted to see and talk to me; he brought me down to the office of Captain Fritz; I did tell Captain Fritz that I would try to help him get the diamonds back.

I finally located Fink about noon on Sunday, in Chicago, [fol. 249] at his home; I had previously learned that Mr. Fink would return to Chicago on Saturday; I called him

there but he was not at his home; I talked to his wife; I did not talk to Mr. Fink there on Saturday. I finally located and I talked to Mr. Fink on Sunday in the presence of Captain Will Fritz.

When I learned that I could get in touch with Mr. Fink in Chicago on that Sunday I got in touch with Captain Will Fritz; on that Sunday I talked to Mr. Fink, the diamond man, at his residence in Chicago; I told Mr. Fink that I wanted him to send those diamonds back; Captain Fritz heard the whole conversation between Mr. Fink and myself.

Pursuant to this conversation between this diamond dealer, Mr. Fink, and myself, according to the instructions that I gave to Mr. Fink, he sent the diamonds back to me in Dallas; I told Mr. Fink to send them back as quick as he could; he said that he would send them by express and would insure them for five thousand (\$5,000.00) dollars; I told him to insure them for that amount and to send them to me. Captain Fritz was in there and he heard that conversation.

These diamonds arrived here on Tuesday morning and I called Captain Fritz, he came over and he got the package; I didn't even open the package; I offered to open it for him but Captain Fritz said, "Never mind; just give them to me". I got a receipt from the express company for these diamonds; I had it here at the last trial; it is supposed to be in some of the papers there (indicating). [fol. 250] (Counsel secures the Receipt) This is the (indicating) Receipt that I paid insurance on to the express company in trying to get these diamonds back from Chicago; I paid \$7.21 on the shipment Mr. Fink shipped to me here.

(Reporter's Note: This express receipt was marked by the Official Court Reporter and introduced in evidence as: Defendant's Exhibit No. 1, and a photostatic copy of same will be found attached at the rear of this transcript.)

The date of this (indicating) Receipt is March 6th, 1950, 2-days after the arrest of Jarrett, who was arrested on March 4th. I received the diamonds back here on March 8th, 1950.

The telephone conversation to Mr. Fink about the return of these diamonds was made by me from store; I had phoned to Captain Fritz to be there; when these diamonds were returned to me I turned them over to Captain Fritz and that (indicating) is the Receipt.

After I had located these diamonds and before I got them back, with reference to my having given Captain Fritz a description of these men that I had gotten them from, I will say that, when I left the City Jail, I went back to my store up there and, enroute, this fellow Jarrett ran [fol. 251] up behind me as I was going through on the Central Tracks, he tapped me on the shoulder and he says, "What's been done to us?"—something like that, like those words; he said, "We want our money"; I said, "If you want your money—" —I said, "I haven't been to the store; just now coming from the ~~jail house myself~~"; I says, "You call me in about 15-minutes", so, when I got to the store, I immediately called Captain Fritz, and I told him, "I would like to see you"; he said, "All right; meet around at the cafe", right there at Main and Central Tracks, R & J Cafe, so, Captain Fritz drove up and we went inside there and I told him about Jarrett running up and tapping me on the shoulder; Captain Fritz asked me about the other one; I said, "I didn't see him but I am sure he is somewhere around. I have no idea where he may be but he is to call me back".

I told Captain Fritz there that I had told Jarrett to call me back on the phone; I had met Captain Fritz there by appointment at the cafe on Main and Central Tracks. Captain Fritz wanted to know where he could get hold of Jarrett; I told him, "He is to call me back in about 15-minutes and, then, I will locate him and you can pick him up there"; we waited around and the phone call didn't come in right away. In about 30 or 40-minutes the phone rang and Jarrett says, "We want to see you; we want to see you right away"; I says—in the meantime I had told Captain Fritz about this Greenville Avenue where I had once met them [fol. 252] and where they might be calling again from, so he and some other officers had gone out there in a car to Greenville Avenue and had looked where I told him to. I told Jarrett, "I cannot leave right now; call me back in

about 30-minutes", as I figured by that time that Captain Fritz would be back.

Jarrett phoned back again and he said, "I thought that you were going to come out here?"; I said, "No; I haven't had a chance to get away". Captain Fritz hadn't gotten back yet; I was waiting for Captain Fritz.

Jarrett again called me back about 3:30 and he says, "Can you come? I will be there at Live Oak and Haskell in front of the drugstore there"; I said, "Okay". Captain Fritz was there and he and his men jumped in a car and drove out there and that is where they arrested Jarrett.

I had told Captain Fritz what Jarrett looked like and how he would be dressed; I described the man and his clothes and I told him that he was kind of greyheaded, that he wore glasses, that he would have something in his lapel and I described his skin.

Prior to the time that I had read in the paper about the Shortal diamonds and heard about them after this robbery, I had never met Mrs. Shortal or Doctor Shortal, nor had I heard of Mrs. Shortal or Doctor Shortal before; I had never known anything about them and nobody had told me anything about them, nor had I had any conversation with anybody in the world about them; I didn't know anything in the world about them until I read about them in the paper. I did not know where Doctor Shortal's Clinic was; I did not know where the Shortal house was out there on Lakewood Boulevard.

With reference to whether or not any part of the statement made here by Jarrett, who I had arrested, about my sending him out there to rob the Shortals is true, I will say that I couldn't have done that because I didn't even know the people; if I had ever seen them I didn't know it.

I never did have a conversation with nor did I phone out to Miss Kate Graham, or anybody else, at the Shortal Clinic or anywhere else; I never called anybody nor talked to anybody out there, never in my life. Nobody ever called me from out there. I heard the testimony of Miss Kate Graham; as to her being mistaken about calling me I will say that I get calls from lots of people who call in and want to pawn things. She didn't say that her name was Miss Kate Graham. I know that. Anyway, I never did talk

to any woman or anybody on the day of this arrest about a Reward; I never talked to anybody at any time about a Reward other than Mr. C. E. DeWitt that one time and then I went up to his office there.

After Jarrett was arrested and after I had turned the Shortal diamonds over to Captain Fritz, after they had been sent here by Mr. Fink, and the Shortals had gotten the diamonds back, I was subpoenaed before the Grand Jury; [fol. 254] at that time no character of a charge had been filed against me; at that time I had not consulted any lawyer or talked to a lawyer about the case; I hadn't talked to anybody. A man came up there with an Instanter Subpoena and I went with him down there and, when we walked into the Grand Jury Room, Mr. Wilson was conducting it at that time, and he told me that he wanted to ask me some questions before the Grand Jury. That was before any charges or any indictment or anything.

All of the records and this (indicating) pistol that the Grand Jury wanted I voluntarily brought before them. All of the information about the swapping of the other gun and the description of the other gun and all of that was voluntarily given by me to the Grand Jury; the information about the pawn tickets and producing the pawn tickets and the dates and the names and all of that was given by me voluntarily to the Grand Jury; I had given the Grand Jury Bailiff all of the books and everything. I did not try to hide or secrete any records, books or information about that.

Captain Fritz did consult with me and I talked with him about whether I had any information or could learn about where Bennett was liable to be. During the time that Jarrett was in jail, with reference to whether or not I started a series of conversations with him, I will say that I did not know where they were from, whether from the Sheriff's Office or where; he was calling pretty regularly. [fol. 255] In regard to my thinking that he was in the jail, I will say that I know that they don't have telephones in the jail upstairs in this jail, up here in these cells, so, I figured that it was downstairs somewhere. I did not know whether those conversations were being recorded; I figured that somebody was taking down notations of them.

Captain Fritz was certainly advised and knew about the conversations from this end of town to up there between Jarrett and I; I called Captain Fritz everytime that I would get one of these calls and I told him about this fellow's calls and what he had told me over the telephone. I certainly was trying to pick up some information about Bennett. I had gotten one of these calls that pretended to be from New Orleans, Long Distance, and it came in on my phone, and said, "This is Scotty"; he says, "I am down here in New Orleans; I have got me a new buddy; I need a little money"; and I said, "Where do you want me to send it to?"; he said, "Send it in care of Western Union"; he hung up the phone and immediately I called Captain Fritz and I told him about the call.

The first conversation over the telephone that I had with Jarrett was from the City Jail; Jarrett called me up and cussed me out; he said, "You Jew son-of-a-bitch, I am going to get even with you when I get out of here"; Jarrett also called me the following day and he said, "I am kind of sorry, I got hot at you"; he says, "I want to apologize to you"; he says, "You can help me down here"; I told [fol. 256] Jarrett that I would try to. I told Captain Fritz about that call; I made a report to Captain Fritz on every call that I had from Jarrett. Captain Fritz has been the head of the Detective Department, City of Dallas, Police Department for the past 30-years, and he certainly is the same Captain Will Fritz that worked this case up, recovered the Shortal diamonds and arrested Jarrett.

Cross-examination.

By Mr. MacNicoll:

I did not talk to Captain Fritz or a single, living Police Officer in the City of Dallas about the Shortal Robbery, or about my knowing anything about the Shortal jewels taken in that robbery, until Saturday, March 4th, 1950; that is correct; and Miss Kate Graham did not call me on March 3rd, 1950. If some woman did call me and asked me about pawning some jewelry on that date I don't remember it; I heard Miss Kate Graham testify but I don't remember that call. I heard her testify once before when she didn't

say that. I heard her testify here in this trial but I don't remember her call.

With reference to my saying that it didn't happen or that I just don't remember it, I will say that I don't think that it happened.

It is correct that I knew that I had possession of those Shortal jewels when I read the Dallas Morning News on [fol. 257] that Saturday night; it was from that date until March 3rd, when I was placed in the City Jail, before I said a word about my having possession of them to anybody; Captain Fritz on that date sent for me and they brought me down there to the City Hall. You know that; I believe that it was 13, 14 or 15 days, around 2-weeks, before I said anything about that to anybody.

I was not, during that 2-weeks, going about trying to collect a twenty-five (25%) per cent Reward; I was not trying to collect anything. In regard to my going to C. E. DeWitt, the insurance adjuster's office about these stolen diamonds, these Shortal jewels, that I had in my possession, and ask for twenty-five (25%) per cent when he said that he could only pay ten (10%) per cent, I will say that I didn't ask for any percentage. I assumed that that was the customary amount to be paid, or customarily paid; I did not mention twenty-five (25%) per cent. If Mr. DeWitt said that I mentioned it he is wrong. I don't know that I told Mr. DeWitt that ten (10%) per cent would just be "cigar money" for you; I didn't say that.

From the Saturday that I say I read about it in the paper until I had Jarrett arrested I knew that I had the Shortal jewels and I say that my only purpose from the time I read about it on that Saturday up to the time of Jarrett's arrest was to have Jarrett and Bennett arrested and to get the jewels back; that is what I am claiming to have done.

As to why I did not phone Doctor Shortal and say, [fol. 258] "Doctor, I read in the Dallas News Saturday about your robbery and I have those jewels", or, "I will turn them over to Captain Fritz", I will say that I did not have the jewels then. I, as a great friend of the Police Department, did not go and telephone to them that I had given Mr. Fink these Shortal jewels immediately after I

read that in the Dallas Morning News because I didn't have the jewels then. I did not think about telling the Police Department what I had done with them; I was trying to get the jewels back.

I did tell this jury that Mr. Fink was an old, tried and true diamond dealer that I had known for some 15-years and that he would return the diamonds straight to Dallas. With reference to why I didn't go to the Dallas Police Department when I had read about this Shortal Robbery as I have claimed here on that Saturday and told them, "I have the Shortal jewels but I turned them over to a reputable diamond dealer, named Fink, whom I have known for 15-years and who has dealt with the best people here in Dallas," and what would have been wrong about that, I will say that I didn't do that because I didn't have the diamonds.

With respect to my not going to trust the Dallas Police Department to get the diamonds back from my good friend Fink and Fink sending them to me and my having to get the diamonds, the truth of the matter is that I kept the mountings here in my pawnshop; Fink just took the stones with him; the mountings were there and also the wedding [fol. 359] band.

I said that I had been in the pawnbroking business for about 25 or 28-years but during that period of time I have not examined and loaned money on hundreds of big pieces of jewelry and diamonds; I didn't have the money to do that. I did tell this jury that I have dealt in diamonds and jewelry for some 25-years here. I also tell this jury that, although I had been in the pawnbroking business for 25-years, I couldn't have looked at the stolen Shortal jewelry and examined it myself without the help of anybody. I am telling this jury here that my experience does not qualify me to pass on diamonds that are brought in there to my place to be pawned when they are big diamonds; you don't see many of those there.

With reference to my telling the jury where the line of demarcation is in the size of diamonds and how small the diamonds would have to be before I would know exactly the value of them and how large they would have to be before I could not do that, I will state that it is not exactly the way that you put it; it is like this: you see something

like a hundred (\$100.00) dollar ring or a two hundred (\$200.00) dollar ring but you don't see any one ring of 6-carats or a cocktail ring of 10 or 12-carats; that is the difference. I can tell the value of a diamond ring of about a carat; I couldn't exactly go up to the value of a 2-carat diamond because I didn't deal in big stones.

[fol. 260] I kept the mountings of these diamond rings right there in my store. When I became suspicious about these diamond rings being the Shortal jewels that I had, I never did go and take these mountings out to Doctor Shortal and Mrs. Shortal and say, "Doctor Shortal and Mrs. Shortal, are these the mountings that your stones were in?". I had that little woman's wedding ring right there in my possession that nothing had been done to; that's right; just little stones effect. I could tell the value of that; I see wedding rings like that, small ones.

Jarrett and Bennett brought these diamonds to me up there; I did not have these diamonds brought there. I had a small safe there but not a large one.

The largest diamonds that I had ever sold in my pawnshop ran from 65-points to 100-points; 1-carat would be 100-points; I have never sold a ring out of that pawnshop that was over 1-carat.

With reference to why, when I was trying so hard to capture Bennett, in the world I wired Bennett money at Houston, I will say that I was not trying to catch Bennett at that time. I cannot fix the date in my mind when I decided to try to catch Bennett. I think that the records will show that I wired Bennett some money in Houston, \$50.00, on March 2nd; that was 2-days before my arrest. At that time I was not trying to arrest Bennett; I was trying to get the diamonds back. I was going to send Bennett [fol. 261] that money and, of course, Bennett could take that money and go to Kalamazoo but Bennett wanted to get some more money; I was supposed to get some more money for Jarrett and Bennett; that's why I felt sure that Bennett would be around.

I was not going to pay money along as a "Broker", a man that helps the Officers make an arrest; I didn't make

the arrest; Captain Fritz did that; I am the man that got Jarrett arrested. I will look over your way now.

I did say that Jarrett called me from the City Hall and called me a Jew Son-of-a-Bitch; that is what I testify that Jarrett called me and I don't know if there was any recording made of that telephone conversation or not; I didn't do anything about that conversation from the City Hall. With reference to Jarrett not calling me a Jew Son-of-a-Bitch in those recordings which you are going to play for this jury here and calling me "partner", I will say that I don't remember what Jarrett called me in those records. I have heard those records played before but it has been a good while back.

I don't remember whether or not I called Jarrett "partner" in those recordings there. When recordings were being made of these telephone conversations with Jarrett, with reference to whether or not I ever told Captain Fritz that, on the telephone, I had said to Jarrett, "It's better that one man drown than ten (10) men drown", I will say that I told him about that conversation; I never told Captain Fritz about that part because I told him about all of it; I say that I did tell Captain Fritz about it.

In regard to my having told Captain Fritz that I had told Jarrett to "stand pat", I will say that I told him everything that I could recall to the best of my recollection. With reference to my having told Captain Fritz that I told Jarrett to "stand pat", I will say that I don't remember every word that was said in the conversation on the telephone. I don't remember whether I told Captain Fritz that I told Jarrett "not to rock the boat".

With reference to the truth of it being that I never said anything to Captain Fritz that sounded like that, I will say that I said everything that I could remember of the conversation made by Jarrett. In regard to my having told Jarrett in a recorded telephone conversation from the County Jail that he talked too much on the blankety-blank telephone, I will say that I wanted to have something to talk about the next time. I didn't say that Jarrett was doing too much talking on the telephone on that particular day.

I have been charged and indicted a couple of times on

Receiving and Concealing; that is true. At this time there is not a conviction against me in the Federal Court here; I did plead guilty but the sentence has not been pronounced.

Jarrett did meet me downtown—he ran into me—and [fol. 263] he said that he wanted some money; I did instruct my negro boy at the pawnshop to give Jarrett \$50.00. I don't recall just what date that was; I don't remember the exact date or about what date it was; it was in the year of 1950; I believe that it was in the latter part of February; I don't know whether it was in the first part of March; I believe that it was in the latter part of February.

I don't remember now whether that was the same day that I sent the Money Order to Bennett or not; it might have been the day after. With reference to Bennett and I doing business under aliases, I will say that I wasn't using any "alias". With reference to what name I told my negro boy to use in sending this Money Order to Bennett at Houston, I will say that, when Bennett called, he instructed me to use the name of T. J. Stewart. I only did what Bennett told me to. In regard to my telling my negro boy to sign an "alias" for my name on that Money Order, I will say that the negro boy did not sign any alias for my name; he signed what name Bennett had told me to; I did tell my negro boy to do it, to sign the name of T. J. Stewart to that Money Order; I didn't know T. J. Stewart; that is not my name; my name is T. J. Schwartz. With reference to T. J. Stewart being a fictitious name or alias, I will say that that is what Bennett told me to do, I did use an alias when I had the money sent to Bennett, I didn't use my true name but I used the name of another man because Bennett told me to do that. That is what [fol. 264] Bennett said for me to do, and I did do it. I did go so far as to furnish money under a fictitious name and send it down there, just the way that Bennett instructed me to do it.

I did not go and contact the Police Department and say, "Now, I have just wired \$50.00 to Bennett down there"; I didn't have the diamonds back then. I did not think that Bennett was going to be able to get those diamonds back to me unless I told him to give them to me; I had not told Jarrett to give the diamonds back to me.

With reference to my wanting Jarrett and Bennett to believe that I still had those diamonds in my possession, I will say that I didn't want them to believe anything; I didn't say "nothing". On that Saturday I did not tell Jarrett and Bennett that I still had those diamonds; I said that I hadn't had time to look them over; I had not then already given the jewelry to Fink.

I did not tell Jarrett or Bennett anything on the following Monday about Fink. With reference to the truth of the matter being that I knew, after I had read that paper on Saturday night, how "hot" those diamonds were and that I gave the diamonds to Mr. Fink, my "buddy", who conducted a business, or was supposed to conduct a business, in Chicago so that he could get out of town with them, that being my motive, I will say that I hadn't read that paper at the time that I gave those diamonds to Mr. Fink. I did not read that paper until Saturday night and I had [fol. 265] talked to Mr. Fink on Saturday morning.

I don't think that Mr. Fink is here. I have been Mr. Fink's good friend and I have been doing business with Mr. Fink for better than 15-years.

With reference to this name that I signed on the Money Order, which I claim that Jarrett or Bennett put me up to, the name of T. J. Stewart, I will say that I didn't go down there. I did tell my negro boy to do it. My full initials are "T. J." Schwartz.

In regard to one of the recorded telephone conversation with Jarrett when Jarrett asked me about the pistol used in the Shortal Robbery and I told Jarrett, when Jarrett asked me if the Grand Jury had found out about that, "Buddy, don't worry about that; they don't know about the guns", and as to that being a part of our recorded conversation, I will say that, if it is, I don't remember; I know that I reported it directly to Captain Fritz. I don't deny that I said that; I say that, to the best of my knowledge, I did not say it. I don't remember having heard that recording played here in this court room. What I now say is that I don't remember now whether I said that or not.

With reference to the truth of it being that I didn't go to any Police Officer and that I didn't say anything to

Captain Fritz until that good woman, Miss Graham, had trapped me, I will say that nobody trapped me.

[fol. 266] I did spend a night in jail here before I said anything to Captain Fritz about these Shortal diamonds; on the following day I did tell Captain Fritz about these jewels. In reference to my not telling Captain Fritz about these Shortal diamonds until then, I will state that I "volunteered". With reference to my not telling Captain Fritz immediately about my having the Shortal jewelry because I didn't have them in my possession, I will say that I had knowledge of when Mr. Fink would be back there in Chicago. I did not have the diamonds in my possession at that time. I got the diamonds back from Mr. Fink 3-days later.

With reference to my not confessing to the Officers that I had had possession of these Shortal jewels until and only after I had been placed in the City Jail, spent the night in jail, and that I told about it the following morning, I will say that I told Captain Fritz that I had the mountings and who had carried the diamonds off. As to why I couldn't have done that right from the start, I will say that I hadn't had any knowledge of where Mr. Fink was.

I met both Jarrett and Bennett out at the corner of Greenville Avenue and McCommas Street; this was about 4-days after the robbery of the Shortals and it was about 3-days after I told the jury that I had read about it in the Dallas Morning News and I believed then that I had the Shortal jewelry. I did not say a word to Captain Fritz about this the third day after the robbery so that Captain [fol. 267] Fritz could pick up Jarrett and Bennett; I had to have that jewelry; that is what I had in my mind.

I did not tell you that these men, Jarrett and Bennett were not using their last names and were just using their first names; that is when Jarrett first came in there. Jarrett and Bennett never did give me their last names; I later learned that the last names that Jarrett and Bennett had given me were not their names.

With reference to my not finding any book wherein I had any record of that gun transaction with Jarrett and Bennett, I will say that I gave the Grand Jury Bailiff that book. In regard to my having told the Grand Jury that

I would get it but that I never did get it, I will say that, I think, the Grand Jury Bailiff brought it down; I gave it to him. I did not tell the Grand Jury that I had examined the book that related to that gun transaction and that I failed to find it; I didn't tell the Grand Jury that. I did produce that book; they sent the Grand Jury Bailiff after it.

As to my not having found the book and produced it on the transaction between Jarrett and Bennett and myself about these guns, I will say that there was one book for all three (3) transactions. With reference to my knowing that I have not brought it down here, I will say that you had a bunch of my books here this morning and I don't see them in here now. In regard to my testimony before the [fol. 268] Grand Jury that I couldn't find the book with reference to that gun transaction. I will say that I sent the books back by the Grand Jury Bailiff. As to it being true that, when I finally found some old books up there, I never could show the Grand Jury any transaction that I had had with Jarrett and Bennett, I will say that you had the books down here; I had the books over there at the Grand Jury and I left them with the Grand Jury. I did point that out to them there.

I told the Grand Jury about the transaction that was taken from that book; the book that I am talking about is the book where we lease guns and 6-shooters. I leased that first gun for \$15.00. As to whether I leased or sold that gun, I will say that we call it "leasing" as it is a 99-year lease; we wrote that in the book that you have here. I am claiming that I leased the guns that were used in this Shortal Robbery; that is what we do with all of them.

With reference to whose name the pistol was leased in, I will say that he would have to sign the book; he had to sign his name on the book; he had to put his name down on the book and his address; he did put some name down on this book. I don't now recall what name and what address he did put down in that book; I gave the books to the Grand Jury Bailiff. I did find the book when the Grand Jury sent me back for it; I sent the books down there by the Grand Jury Bailiff.

[fol. 269] I don't know what I meant by telling Jarrett when he was in the County Jail that the Grand Jury didn't

know anything about the guns; I don't deny that I told him that; I don't know whether I did or not. My records would show who a gun was leased to with person's address. I don't remember hearing a thing about the pistols. I could be wrong about that or about anything. I could not be wrong when I said that I gave the book to the Grand Jury Bailiff.

In the newspaper article that I read, which was on Saturday night, I don't know whether that article was in the bulldog edition—what they called the bulldog edition of the Dallas Morning News; I never heard that phrase, bulldog edition, used; I don't know; I know that it was a paper that you buy on the street. This was bought about 10:30 o'clock P. M. I got that paper on Sunday night; I bought it at the corner of Oak Lawn Avenue and Cedar Springs Road and Lemmon Avenue.

There was not any extra big story in that Saturday night's paper, just about the Shortals being robbed; it was not headlined; I don't really recall whether it was a small account or not; I just read it in that paper. What caused me to believe that I had the same jewels that the paper said the Shortals had lost in that robbery was about a 6-carat diamond. I don't remember whether or not that newspaper article mentioned the weight of the diamonds except that they were "large stones".

[fol. 270] I cannot tell this jury what it was in that paper about the 6-carat diamonds; I don't remember that. I mention that because I know that it was a big diamond, the way that it mentioned it. I don't remember whether the paper said anything about it being a 6-carat diamond. I remember that the article said that Mrs. Shortal had been robbed of a wedding band, and I believe that the article described it generally.

I believe that this newspaper article said that three (3) diamond rings had been taken in that robbery. As to one being a 6-carat diamond, I will say that I don't think that the article stated the amount of it; it just said that one ring was "large" and some description that I have forgotten. I don't have the paper with me.

With reference to the truth of it being that there wasn't a thing on earth given out in that story about the descrip-

tion of the weight of those diamonds, as to carats, I will say that I don't remember; I don't know what was in there; I just remember reading about those people getting robbed.

This newspaper article did not just have in it what I already knew because I already had the Shortal diamonds; I didn't know anything about that.

When Bennett first came in there it was not to have a crystal on his watch; it was to pawn his watch; he did want to have his crystal fixed; I charged him \$1.50 for that; I claim that I let Bennett have \$15.00.

[fol. 271] It was about three (3) or four (4) days from this occasion until Bennett came back in there with this thirty (\$30,000.00) or thirty-one thousand (\$31,000.00) dollars worth of diamonds. With reference to it seeming a little odd or peculiar to me that a man who had been in there only about two (2) or three (3) days prior, trying to get a crystal on a watch fixed, would bob up later with thirty (\$30,000.00) or forty thousand (\$40,000.00) dollars worth of diamonds, I say that Bennett had stated that he and his wife were having some trouble, they were going to get a divorce and that he wanted to get the diamonds from her that he had given to her, and that they had two (2) children.

I bought my newspaper on Saturday night; I don't think that this (indicating) newspaper article that you have shown me here, instead of saying that the robbers took three (3) diamonds rings, as I said, saying that the robbers took four (4) rings, with nothing in there saying anything about the description and the worth of the rings, how many carats they were, is the same story that I read that Saturday night. As to my telling this jury what day I read my newspaper article about the robbery and that I didn't read it on the night of the robbery, I will say that this (indicating newspaper article) says, "Sunday, February 19th, 1950". I don't know anything about this (indicating) being the Dallas Morning News for Sunday that you buy on Saturday night.

[fol. 272] As to my having told this jury that this (indicating) is the paper that came out, the early Sunday paper, and that I bought it on that Saturday night, I will say that I do not even remember reading it (indicating) on the

inside of the paper. It is not the truth that I read the bulldog edition that came out on that Friday night after the Shortal Robbery, the same day of the robbery, and that this (indicating) is the paper that I read that Saturday night; I bought my paper. I did not read those (indicating) big, bold headlines.

With reference to the Friday night paper describing a ring as 7-carat ring, I will say that I did not buy that paper; the paper that I bought was on Saturday night, because I wanted to get the football and baseball, sporting section, for my kid in that paper; otherwise I wouldn't have bought it.

In regard to my not needing a newspaper to advise me about the Shortal Robbery because I planned it, I will say that I did not plan it; I first learned of it through the newspaper.

If the boy who fired this gun up there knew two (2) maids that worked in the Shortal home, I didn't know about it; as to his having told me about that, I will say that that is his personal business. I have done a little bit of business with colored people up there.

Re-direct examination.

[fol. 273] By Mr. Hughes:

I did not promise Captain Fritz of the Dallas Police Department, or anybody else, to tell them anything about who was in the robbery in order to be released from the City Jail; I didn't say anything. No lawyer sued out any Writ of Habeas Corpus or anything to get me out of jail; Captain Fritz turned me out himself. While I was incarcerated there in the City Jail I did not tell them anything about this robbery. I did not tell Captain Fritz anything about this robbery until I could produce the diamonds; that's when I told him.

With reference to talking about this T. J. Stewart that I used in sending Bennett that \$50.00 to Houston, signing the name of T. J. Stewart, I will say that Bennett went by the name of T. J. Stewart. The pawnshop records show that Bennett used the name of Stewart up there. The records that the Grand Jury Bailiff brought down here show

that Bennett went by the name of T. J. Stewart. I brought the Grand Jury the records that showed that Bennett went by the name of T. J. Stewart; I brought them down here to the Grand Jury Room.

I made a report to Captain Fritz of the Dallas Police Department as nearly as I could remember of everything that was said in the twenty-five (25) telephone conversations with Jarrett from the County Jail, eight (8) records of which they have talked about and have had identified here.

When these diamonds were brought to me up there and, [fol. 274] as I have said, I looked at them, I did not know the value of those diamonds. I did not hear in the grand jury testimony or hear anybody say that there were thirty thousand (\$30,000.00) dollars worth of diamonds taken until I heard Mr. MacNicoll here say it.

They asked me if I ever told Jarrett and Bennett, during the time that I was trying to get these diamonds back and giving Jarrett and Bennett a little money along, that these diamonds were out of the state and in the possession of Fink; I did not tell Jarrett and Bennett that.

Re-cross examination.

By Mr. MacNicoll:

I was afraid to tell them that even though one of them was in jail and I was sending the other one in Houston money.

Re-direct examination.

By Mr. Hughes:

The first time that I sent any money to Houston nobody had been arrested up to that time.

(Witness Excused.)

The defendant rests.

[fol. 275]

Rebuttal

LESTER EMMETT BENNETT, the first witness called by The State of Texas on Rebuttal, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Wade:

My name is Lester Emmett Bennett; I am 35-years old; I was born in Many, Louisiana; my family lives in Houston, Texas.

I am under indictment for the robbery of Doctor Shortal's home; I am guilty of that charge and I will plead guilty at the proper time.

With reference to my ever having been convicted of any felony before this, I will say that I was on a 5-year probation for a felony in Ohio; it was the defrauding of an inn-keeper and registering under an assumed name in a hotel up there and forgery was a part of the assumed name.

I was in jail at Cincinnati, Ohio, last January, 1950, under some kind of a charge; that was the same charge; it was a Misdemeanor and that grew out of the same charge. I was, I think, in that jail for about 5-months and 7-days or thereabouts on that charge. I got three (3) months time. [fol. 276] I was raised in Houston, Texas; the first business that I got into after I got out of school was the Humble Oil & Refining Company, in the capacity of Timekeeper—Field Clerk. I worked for them almost five (5) years; I worked for them in their Houston Office and at their Texas City Terminal.

After I left the Humble Oil & Refining Company I became a Pilot in the Air Force in this last War; I was a Fighter Pilot in the Air Force; I was with the Air Force a little over 2-years, 2-years and 3-months. I was discharged from the Air Corps in June, 1944.

After getting out of the Air Force I went to work for a fellow in Springfield, Illinois, as Southwest Representative; I was in that business for about a year.

After that I went into business for myself; I was in business for myself about 2-years; I was distributor in the Southwest for an automobile polish.

After that I went to Kentucky and I worked there as an appliance salesman for a year.

I have drank quite a bit of whiskey in my life; I have been an "alcoholic"; I am a Member of the Alcohol Anonymous.

On or about January 1st, 1950; I was in jail at Cincinnati, Ohio, doing a part of a 3-months term. I escaped from that jail with Jarrett.

We first went to Chicago, Illinois; then, on to Davenport, [fol. 277] Iowa, and, then, back to Newberry, Kentucky, and, then, down around the outskirts of Beaumont, Texas, on into Houston, Texas.

My father is not now living. The day that they notified me that my father had died was the date that I broke out of the Cincinnati, Ohio, jail.

Eventually Jarrett and I came on up to Fort Worth, Texas; there I worked one day for the Lone Star Gas Company and they liked my work, so, they had me to fill out the usual form and they gave me a bond form to fill out over Sunday, which I could not do, so, I figured that I had better leave, so, I had to leave that job.

I, then, came over to Dallas, Texas, here. My attention having been directed to the 17th day of February, 1950, the date of the Shortall Robbery, I will say that I had an occasion to meet the Defendant in this case, Tommy Schwartz, on the 15th day of April, 1950, prior to the robbery. I met the Defendant in his pawnshop on Elm Street, the Day & Night Pawnshop.

The occasion for my meeting Schwartz was that Jarrett had taken me in there and Jarrett introduced me to Schwartz. Schwartz, Jarrett and I had a conversation there in that pawnshop on February 15th, 1950. As to whether or not at that time we made any arrangements, or agreement, as to the distribution of any "loot" which we might get, the three (3) of us, I will say that the disposition, or [fol. 278] division, of whatever was gotten in the robbery was to be divided three (3) ways, a third to Schwartz, a third to Jarrett and a third to me.

The Defendant Schwartz was to plan the robbery, case it and tell us who had the jewelry or whatever it was, and furnish the guns; Schwartz was to dispose of the "loot".

I next saw the Defendant Schwartz on February 16th, 1950; the conversation on that night was relative to the Shortal Holdup the next day. On the night of February 16th Schwartz told us to come back the following morning and that he would have the full information on the robbery, furnish us information on the people, who they were, and whatever details we needed.

Prior to that time I had not gotten any gun from Schwartz; I didn't get a gun from him until the following day there.

Jarrett and I went back there on the morning of February 17th and that is when Schwartz gave us the details of the robbery. I will tell the jury what the Defendant, Tommy Schwartz, told us there about where we were going to rob; Schwartz told us the people's name and Schwartz drove us out on Swiss Avenue to look at an apartment house because he thought that the Shortals had an apartment there at that time; Schwartz said that the Shortals would either be living there or out on Lakewood Boulevard, that he didn't know the exact address, so, we all drove out there on Swiss Avenue in Tommy Schwartz's car; and I went into the [fol. 279] foyer of that apartment house out there and I looked at the mail boxes to see if the Shortals were in that building, and their name was not on any mail box there; and, then, I went back to the car and I told Schwartz and Jarrett that they were not in the building; we, then, drove around to the back and looked into the garage to see whether we could see Mrs. Shortal's Cadillac, so, we next went back to the pawnshop; and we looked in the Kriss Kross Directory and the phone book for the correct address on Lakewood Boulevard, and we found the Shortal's house number.

I don't remember now whether the Kriss Kross was in his place of business or where Schwartz got it or the telephone book but it was one of his; he had both of them there at his place of business.

We finally located an address in there; Schwartz was called to the telephone and I spun the book that he had been looking in around and I just glanced down until I found the name and the address and I asked Schwartz if that was the right one; he said, "Yes", that that was the correct address.

I am not sure but I believe now that that address was No. 7210-Lakewood Boulevard; it's been a long time now.

I wanted another gun because Jarrett and I had missed a robbery the night before for Schwartz because of the lack of ammunition and guns; so, Schwartz furnished me with a 38-caliber revolver at that time; it was a Colts revolver; he [fol. 280] also furnished me with ammunition for that gun. The Defendant Schwartz did not ask me to sign my name in any book there; I did not sign anything about the gun in any book. I threw that gun later into the San Antonio River after I had to leave Dallas.

At the time that I got this gun Jarrett already had a gun; this (indicating) revolver is the gun that Jarrett had at that time and this (indicating) is the one that he had later. Jarrett, I believe, swapped this (indicating State's Exhibit, No. 1) for this (indicating State's Exhibit, No. 2) gun. I was in there when the negro boy went upstairs and shot one of those guns to see if it would shoot; that negro Davis took this (indicating) Brevetti semi-automatic and shot it twice.

On February 17th Jarrett and I left that pawnshop and we went out to the Tourist Courts and I called the Shortal residence to find out if Mrs. Shortal was in; she was not in, so, we drove by the house, parked, went up to the door, we knocked on the door and a negro butler came to the door. I knew already that Mrs. Shortal was not there but Jarrett and I wanted to see who was in the house and, when he answered the door there, I asked the negro butler if Mrs. Shortal was at home; he said that she was not in; so, I asked him what time Mrs. Shortal was expected; he said, "About 4:00 o'clock", so, I told him that we would be back at about 4:00 o'clock that afternoon, and we drove away.

[fol. 281] Jarrett and I came back there at 3:45 P. M. that afternoon—about that time—and we knocked on the door again, and the negro butler came to the door and opened it; I told him that we would like to leave our card; I asked if Mrs. Shortal was in then; I knew that she wasn't, so, I told him that we would like to leave our card and, when he opened the door to get our cards, the holdup began.

Jarrett tied this negro butler up, and I took the negro maid upstairs, Jarrett came upstairs and I went back down-

stairs. Just about the time that I got back downstairs I noticed that the negro butler was missing; he had only been gone a short time and I called to Jarrett and asked him where the negro butler was; Jarrett said that he had probably ran somewhere; I couldn't see him; about that time I heard the back door open and it was Mrs. Shortal coming into the kitchen there; she walked into a little den just off of the kitchen and she then went over there to put down her groceries and, then, I told her that it was a holdup.

I did not go upstairs with Mrs. Shortal; Jarrett took Mrs. Shortal upstairs. I knew that the negro butler was missing and I figured that it was getting "pretty warm" about that time, so, I called to Jarrett that the negro butler was missing, and Jarrett came right down and we, then, left there.

From there Jarrett and I drove to the Blue Bonnet Courts; we took our guns and threw them in the luggage and the blackjack that I had, and we, then, drove immediately to Tommy Schwartz's pawnshop; I would say that we got down there between 30-minutes and an hour after this robbery out there.

Jarrett had the jewels in his possession and, when Jarrett and I went into the pawnshop, the first thing that the Defendant Schwartz said was, "What? Not already?"; and I told him, "Yes", that it didn't take all day, so, Schwartz asked, "What have you got?"; I had previously told Jarrett not to give Schwartz but one piece at a time because I didn't have too much faith in Schwartz; and Jarrett gave Schwartz the 7-carat ring first, and Schwartz asked us if we had any more, and Jarrett then gave Schwartz the ring with the two (2) 4-carat stones; then, Schwartz asked if that was all, and Jarrett then gave to Schwartz the wedding band; then, Schwartz asked about the watch that he had previously told me not to get; Schwartz had told me that he didn't want the watch; then Schwartz changed his tune and said, "I told you that I wanted the watch", and he wanted to know if we had it.

I did not notice whether Mrs. Shortal had the watch on or not; I am sure that she did; Jarrett mentioned it.

The day before or on the morning of that Shortal Robbery

Schwartz told Jarrett and I that Mrs. Shortal had rings, necklace, earrings—he told us about the five thousand (\$5,000.00) dollar wrist watch and the approximate number of carats. I think that Schwartz said that there were approximately twenty-four (24) or twenty-five (25) carats [fol. 283] in the three (3) rings. Schwartz told Jarrett and I not to get the wrist watch, that he could not handle the wrist watch.

At this time Jarrett and I left those Shortal diamond rings with Schwartz and Schwartz gave Jarrett and I a hundred (\$100.00) dollars or one hundred and fifty (\$150.00) dollars; I don't remember how much exactly; Schwartz told us that he would have the remainder of our money on the following morning; Schwartz told Jarrett and I to stay in town and to be sure to go to a good hotel, not to go to one of the hotels of ill reputé or anything like that. Jarrett and I checked into the Adolphus Hotel.

I there used the name of "Major Scott Travis" and I think that Jarrett registered his name there as "Captain Freeman Tartar", or something like that. Jarrett and I stayed in the Adolphus Hotel there until the following afternoon, about 1:00 o'clock, and I then checked out and moved over to The Baker Hotel; I registered into and I stayed in The Baker Hotel there until the following Thursday.

I tell this jury that, previous to this robbery, I had never lived in Dallas; I think that Jarrett and I got to Dallas the first time two (2) or three (3) days before—about February 13th, 1950—the first time. Up until the time that the Defendant Schwartz told me about Mrs. Shortal I had never before heard of Doctor Shortal or his wife; I had never seen [fol. 284] either of them.

I have never been convicted of robbery; I have never been charged with robbery before.

The next time that I saw Schwartz after this robbery was this time immediately after the robbery. The next time I saw Schwartz after the conversation at that time which I have related was on the following morning when I went by there and I got some more money from him; I got a hundred (\$100.00) or one hundred and fifty (\$150.00)

dollars then. I think that both Jarrett and I went in there at that time; I am not sure.

At this time Schwartz told me that he hadn't been able to contact the fellow who was going to "fence" it; he said and he gave us the name of "B. J. Fink", who is a diamond salesman.

At that time I did have a conversation with the Defendant Schwartz about the gun that I was using; Schwartz wanted the "38" that he had loaned me back; I did not have the pistol with me that morning. At that time Schwartz told me that he wanted this "38" gun back, that it was "hot", that it had been recognized. I, then, told Schwartz that, if he wanted his "38" back, I wanted another gun; Schwartz then asked me if I had any preference; I told him, "No", but that if he had any Brevetti I would take that; that's a semi-automatic; and then Schwartz gave me a Brevetti with plastic handles.

You have shown me what has been marked as State's [fol. 285] Exhibit, No. 13, which I now identify as the Brevetti that the Defendant Schwartz gave to me on the morning following the Shortal Robbery. I did not give Schwartz the other gun back at that time; I did not have that gun with me at that time; I did not want to carry a gun around town; I had left the other gun in my luggage. At that time, Schwartz also gave me that (indicating) a clip of shells for this (indicating) Brevetti gun.

(Reporter's Note: This Brevetti gun, with clip of shells, having previously been marked by the Official Court Reporter for identification was introduced into evidence as: State's Exhibit, No. 13, and, due to its size, same is not attached to this transcript.)

The next time that I saw the Defendant Schwartz was on Monday morning following, out there on Greenville Avenue; Schwartz had another fellow with him that he brought out there in his car; we didn't talk to the other fellow. I think that Jarrett or I asked Schwartz who the man was because we didn't like him bringing anybody around to see us, and Schwartz said that that was all right, that the fellow was "cooling out" and that he was from the North somewhere..

The Defendant Schwartz, with reference to the jewelry, then said that he still hadn't been able to make his contact [fol. 286] with this fellow Fink and he said that he would surely get in touch with him the next day or two and for us to be patient, and Schwartz gave us some more money; I think that it was \$80.00 that he gave us at that time.

At that time I was registered and staying at The Baker Hotel. The next time that I saw the Defendant Schwartz, I think was on Greenville Avenue, on that Wednesday; we saw him there around at the side of a drugstore; I don't know the name of the cross street there. At that time Schwartz said that he hadn't been able to do anything about these jewels, that he had not been able to contact this fellow Fink, that Fink had left Fort Worth and gone to Houston and various other places but that he thought that he could get Fink the next morning, be able to contact Fink the next day, so, the following morning—I don't remember whether he gave us any more money on that day or not—that was on Wednesday—I think that he did give Jarrett and I what he had on him; but the next morning we went by his pawnshop, myself, and picked up two hundred and fifty (\$250.00) dollars, and asked Schwartz where the rest of it was; Schwartz said that he hadn't been able to fence them yet, that it would take a little bit to do this, so, I took the two hundred and fifty (\$250.00) dollars and went out there on Greenville Avenue and split it with Jarrett; and I, then, went back to The Baker Hotel and made a reservation on a Houston plane for that night, and I left and went to Houston.

[fol. 287] I did have contact with the Defendant Schwartz while I was there in Houston; I called Schwartz Long Distance from the Texas State Hotel; I believe that that was on Saturday, 25th, the Saturday following the 18th of February, which would be the 25th. That time I called him at the pawnshop, person-to-person; I talked to Schwartz then; Schwartz at that conversation told me that he hadn't made any "deal" yet and that Jarrett was supposed to meet him that afternoon here in Dallas, and I told Schwartz to send me some money, which he did; Schwartz wired me \$50.00 to Houston. I told Schwartz to send that money in care of Louise Kendrick; she was a friend of mine; that

is the name that we got the money on. Schwartz then wired me \$50.00, less the expense of sending it; it was \$48.00 and something. That is the money that this Defendant, Tommy Schwartz, sent me down there, \$48.57, (indicating).

I did not tell Schwartz to sign the name of "T. J. Stewart" to this Money Order; Schwartz used an alias there.

(Reporter's Note: This Western Union Money Order was marked for identification by the Official Court Reporter and introduced into evidence as: State's Exhibit, No. 14, and a photostatic copy of the same will be found, in numerical order, attached at the rear of this transcript.)

[fol. 288] I did have further conversation with the Defendant Schwartz; I told him to get on the ball and I think that that was about all during that conversation. I did talk to Schwartz again before I came back here to Dallas; I called Schwartz Long Distance at another time; I believe that I called him next on Wednesday; I am not sure about that—either Tuesday or Wednesday—the following Tuesday or Wednesday; that would be somewhere around February 28th, 1950.

With respect to those jewels, in that conversation Schwartz told me that he still hadn't "fenced" them; I don't believe that I then asked Schwartz too much about that because Jarrett was scheduled to meet Schwartz here in Dallas at the pawnshop about that date. As to whether or not Schwartz sent me any money at that time, I will say that I have never been able to figure it out whether Schwartz sent it or Jarrett sent it; I think that Schwartz sent it though. That was \$50.00, less the expenses of sending it. This money was also sent in care of Louise Kendrick.

I did come on back up here to Dallas; Jarrett and I came up here from Houston together; we came back up here on the following Saturday, March 4th, I think; Jarrett and I got here early in the morning, a little after midnight. Jarrett and I had been trying to contact this Defendant Schwartz.

I finally saw Schwartz here in Dallas; Jarrett and I had parked our automobile on the street back of the pawn-[fol. 289] shop; this was about 11:00 o'clock A. M. I did not talk to Schwartz there; Jarrett got out of the car there;

Jarrett and I did not want Schwartz to see us. I never had any further conversations with the Defendant Schwartz; I don't believe that I talked to Schwartz any more at all.

I was out there at Haskell and Live Oak Street when they arrested Jarrett; I drove on off from there and I went back to Houston, then to San Antonio and, then, to Seattle. I was arrested in Seattle, Washington, and was brought back to Dallas.

With reference to my being guilty of the robbery of Mrs. Shortal, I will say that I robbed her. Neither you nor any other District Attorney has ever promised me anything for testifying. I am in jail now; I have been in jail 10-months and some odd days. I was first put in jail April 6th, 1950.

Since that date I have made efforts to get out of jail; I have filed several Writs of Habeas Corpus; the lawyers that represented me in that were Burt Ashby and Albert Reagan; they have filed these Writs of Habeas Corpus to help me make bond; none of those Writs of Habeas Corpus have been granted; I am still in jail. Burt Ashby and Albert Reagan filed these Motions that I am talking about; I am not a lawyer and I did not have anything to do with their preparation.

In regard to my signing where they told me to sign, I will say that I go by my counsel, what he tells me; that's what [fol. 290] he is paid for; they did tell me to sign and I did sign. I did not read them over; I glanced through them.

Cross examination.

By Mr. Monroe:

I said that I was arrested in this case on April 6th, 1950; I robbed Mrs. Shortal on February 17th, 1950; I was running away from the law when I was apprehended. I was indicted here for Robbery with Firearms. I fully understand that the maximum penalty for Robbery with Firearms is death; I do say that I am guilty.

I do say that I have not made any trade with any one, no District Attorney; it is the truth that I have never been

promised any consideration whatsoever. Mr. Wilson didn't promise me that he would not ask for the death penalty.

After I had been in the jail for several months I did employ lawyers to file Writs of Habeas Corpus and to prepare bond for me in this case, absolutely.

The following language: "Petitioner would show that the evidence against him, or likely to be produced against him, in this cause will not result in the infliction of the death penalty; that no one was injured by firearms, or otherwise, in the course of the robbery in question and Petitioner would further show that since the filing and hearing upon his former Application for Writ of Habeas Corpus he was promised by the District Attorney of Dallas County [fol. 291] that bond would be allowed him in this cause, and, further, that the Prosecuting Attorney would not ask for the death penalty in his case, in consideration of his testifying for The State and against the said Thomas Schwartz aforementioned, and Petitioner is ready and willing to testify to the truth of these facts upon hearing upon this Application. That he is now denied bond and is entitled to bond in a reasonable amount", does appear in that (indicating) Application for my Writ of Habeas Corpus and I signed that Application with those allegations in it but the wording used therein is that of the lawyers who prepared it.

With reference to my having read that Application, I will say that I glanced through it. I did not make that further Affidavit; the lawyer did that. In regard to my having signed that (indicating) Affidavit reading: "Date: August 8th, 1950. The State of Texas. County of Dallas. Lester Emmett Bennett, the above Petitioner, being duly sworn, states upon his oath that the allegations contained in the foregoing Application for Writ of Habeas Corpus are true", I will say that I did sign that Affidavit; I will sign anything that a lawyer that I pay hands to me.

I hired a lawyer to get me out of jail. I told the lawyer that my reason for being entitled to get out of jail was because Tommy Schwartz was out of jail. With reference to my having signed that Affidavit that you have just read to me, dated August 8th, 1950, I will say that I think that

[fol. 292] I paid a lawyer, Mr. Monroe, to file that; I am not being smart; I am just telling you about it.

On this Affidavit, dated September 4th, 1950, the name "Lester Emmett Bennett" is signed to that Affidavit; that (indicating) is my signature. With reference to whether or not I signed and swore to that Affidavit there on September 4th, 1950, I will say that I had an attorney and whatever he handed to me I signed it; that (indicating) is signed by me before a notary public on September 4th, 1950. I was then again seeking bond; I have sought bond ever since I have been in jail here.

In regard to my having given the lawyers representing me the information that is in the various Applications for Writs of Habeas Corpus, I will ask you if I am qualified to do that? I don't know whether I gave that lawyer any information or not; all that I did was to just tell him to get me out of jail; Schwartz was out and I wanted to get out.

With reference to my telling my lawyers that Mr. Wilson, the District Attorney, had promised me that he would grant me bond and that he would not ask for the death penalty if I testified against Schwartz, I will say that the conversation that I had with my attorney was to the effect that I did not think that they had enough on me to give me the death penalty. I did not tell the attorney of any purported agreement that I had with the District Attorney because there was no agreement.

[fol. 293] In regard to my having testified in the last trial of this cause, when I was asked whether or not there was an agreement, that there was no agreement, after Mr. Wilson had sworn that there was no agreement, but that I admitted that I did have such an agreement and swore to it before a notary public, I will again say that I signed whatever the lawyer brought in.

I was aware of what was in the instruments, and I was willing to do anything to get out on bond; I wanted to be right out there with Schwartz. With reference to my having told the jury and the Court whether or not I would swear to anything against the Defendant Schwartz that I thought would do me any good in my case, I will say that all that I am doing here is telling the truth.

In regard to my having testified here under oath that

I sworn to both of these (indicating Applications) instruments, I will say that I swore to what my lawyers brought me. I did not read what my lawyers brought me; it is not my business to do that; that's right.

(Reporter's Note: Relator's Petition and Affidavit out of Third Application for Second Writ of Habeas Corpus, filed September 5th, 1950, was marked for identification and introduced into evidence as: Defendant's Exhibit, No. 2, [fol. 294] and Excerpt from Relator's Application for a Writ of Habeas Corpus, filed July 8th, 1950, was marked for identification and introduced into evidence as: Defendant's Exhibit, No. 3, and the same appear as follows:)

DEFENDANT'S EXHIBIT, No. 2

"No. 7711-AB

In Criminal District Court, No. 2, Dallas County, Texas

STATE OF TEXAS

v.

LESTER EMMETT BENNETT

Third Application for a Second Writ of Habeas Corpus
To the Honorable Judge of Said Court:

Now comes Lester Emmett Bennett, your Petitioner herein, and would respectfully show that he is illegally confined and restrained of his liberty in Dallas County by Bill Decker, the duly elected Sheriff of Dallas County, Texas, the nature of such illegal confinement and restraint being:

Your Petitioner is restrained by virtue of a Warrant charging a felony in the State of Ohio; your Petitioner would show the Honorable Court that this is not a Governor's Warrant and there has been no request for your Petitioner from the Governor of Ohio. A copy of this [fol. 295] Warrant is attached hereto.

Petitioner is under indictment for Robbery with Firearms which indictment was returned March 27th, 1950, a copy of this indictment is attached hereto.

On May 5th, 1950, Petitioner filed Application for Writ of Habeas Corpus and was denied bond on May 8th, 1950, whereupon an appeal was taken to the Court of Criminal Appeals of the State of Texas, at Austin, Texas, but no Statement of Facts accompanied the record in such appeal.

This is a Third Application for a Second Writ of Habeas Corpus under Code of Criminal Procedure, Article 171.

Your Petitioner would show the Honorable Court that since the hearing on his Writ of Habeas Corpus, new evidence which was not available at the time of the first hearing on May 8th, 1950, was had, is available, this new evidence consists of the following:

First

That the offense is now bailable because Thomas Schwartz, in a companion case, Cause No. 7768-A/B, was tried for the same offense for which your Petitioner is charged, and that on the trial thereof there was no conviction, a hung jury resulting in a Mistrial. This occurred since your Petitioner's hearing on May 8th, 1950.

Second

[fol. 296] That in the aforementioned Thomas Schwartz case the death penalty was not even asked by the District Attorney.

Third

Your Petitioner would show the Honorable Court that he was promised by the District Attorney's Office that bail would not be contested if he testified for the State of Texas against Thomas Schwartz. This occurred since your Petitioner's first hearing on May 8th, 1950.

Fourth

That in the case of The State of Texas vs. Thomas Schwartz, a companion case to your Petitioner's case, involving the same transaction and the same injured party and occurring at the same time, the Defendant, Thomas

Schwartz, has since your Petitioner's Hearing on May 8th, 1950, been permitted to make an after indictment bond in the amount of \$10,000.00. Your Petitioner contends that this is evidence of the fact that your Petitioner's case is not one for the death penalty when a principal in the same case is at large on bond.

Wherefore, premises considered, your Petitioner prays that the Honorable Court grant his Application for a Second Writ of Habeas Corpus forthwith, and that your Petitioner be granted a Hearing thereon, and your Petitioner further prays that the Honorable Court grant bond in the above styled and numbered cause, and for such other relief in law or equity to which he may be entitled.

[fol. 297] (Signed) Charles W. Tesmér, Albert S. Reagan, Attorneys for the Defendant.

Date: September 4th, 1950.

STATE OF TEXAS,
County of Dallas.

Lester Emmett Bennett, the above Petitioner, being duly sworn, states upon his oath that the allegations contained in the foregoing Application for Writ of Habeas Corpus are true.

(Signed) Lester Emmett Bennett.

Sworn to and subscribed before me this, the 4th day of September, A. D., 1950.

(Signed) D. K. McMahan, Notary Public in and for Dallas County, Texas. (Seal.)

AFFIDAVIT

THE STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, a notary public in and for Dallas County, Texas, on this day personally appeared Lester Emmett Bennett, known to me to be the person whose name is subscribed hereto, after being by me duly sworn, upon his oath says:

My name is Lester Emmett Bennett and I am the Defendant [fol. 298] in Cause No. 7711 A/B, styled State of Texas vs. Lester Emmett Bennett, in which cause the attached Application for a Second Writ of Habeas Corpus has been filed, which Application was signed and sworn to by me.

If permitted to testify upon a hearing of said Application for a Second Writ of Habeas Corpus, I would testify that subsequent to the former Application for Writ of Habeas Corpus filed by me May 5th, 1950, and subsequent to its denial on May 8th, 1950, that the District Attorney of Dallas County, Texas, promised the affiant that he, the said District Attorney, would agree to a reasonable bond in this cause, and Affiant would further testify that it is the custom in Dallas County, Texas, that the recommendation of the District Attorney in such cases is followed by the Court.

If permitted to testify, your Affiant states that he would offer evidence that the offense with which he is charged is a bailable offense, such evidence being documentary evidence, which consists of the bail bonds in the case of The State of Texas vs. Thomas Schwartz, No. 7768-A/B, which would indicate that the offense is not one for which the death penalty would be asked or meted out by a jury.

Your Petitioner will prove that in the first trial of Thomas Schwartz no conviction resulted.

Your Petitioner will offer documentary evidence also of the fact that the death penalty was not even asked for in [fol. 299] The State of Texas vs Thomas Schwartz case.

Executed this the 4th day of September, A. D., 1950.

(Signed) Lester Emmett Bennett.

Sworn to and subscribed before me, this the 4th day of September, A. D., 1950.

(Signed) D. N. McMahan, Notary Public in and for Dallas County, Texas. (Seal.)"

DEFENDANT'S EXHIBIT, No. 3

"Application for Writ of Habeas Corpus

No. 7711-AB

In the Criminal District Court, Dallas County, Texas

THE STATE OF TEXAS

VS.

LESTER EMMETT BENNETT

To the Honorable Judge of said Court:

Petitioner would show that the evidence against him, or likely to be produced against him, in this cause will not result in the infliction of the death penalty; that no one was injured by firearms, or otherwise, in the course of the robbery in question, and would further show that since the filing and hearing upon his former Application for Writ of [fol. 300] Habeas Corpus he was promised by the District Attorney of Dallas County that bond would be allowed him in this cause, and, further, that the Prosecuting Attorney would not ask for the death penalty in his case, in consideration of his testifying for The State of Texas and against the said Thomas Schwartz aforementioned; and Petitioner is ready and willing to testify to the truth of these facts upon hearing upon this Application. That he is now denied bond and is entitled to bond in a reasonable amount."

I do belong to a good family. With reference to my being an alcoholic, I will say that I have been an abstainer for ten and one-half (10½) months; I will tell you that.

I first got acquainted with my partner Jarrett in the Cincinnati, Ohio, County Jail; I was not in there as a "con man" and "swindler"; I was in there for the technical offense of Defrauding an Innkeeper, signing a hotel register under an alias; he asked me to give him a check and I gave him a check. With reference to whether or not that check was forged, I will say that you have got your point across.

I was in the Army for a while; I was discharged from the Army before the War was over.

I am not under a 5-years probated sentence in Tampa, Florida, for Defrauding an Innkeeper. I was given a 5-year [fol. 301] probated sentence in Cincinnati, Ohio, as you well know. With reference to whether I have served or yet began to serve the 5-year probated sentence in Cincinnati, Ohio, I will say that they have never revoked my probation there. In regard to whether I have been back to Cincinnati, Ohio, I will say that I have not and they are not coming down here to get me either.

I was not in Tampa, Florida, on May 25th, 1945; that is 1944; you had that wrong before.

I was not arrested in Springfield, Illinois, on October 25th, 1945, for Defrauding an Innkeeper.

I was serving a sentence in the Cincinnati, Ohio, jail for Defrauding an Innkeeper and it was there in that jail that I met Jarrett; it was from that Cincinnati, Ohio, jail that I sawed out to liberty, Jarrett and several other men and myself. For some reason, after we had sawed out, Jarrett and I went together; when we left there the others went elsewhere but Jarrett and I went together.

I knew that Jarrett was a robber. With reference to Jarrett having told me that, I will say that I understood that he was. I think that Jarrett did tell me that he was under a life sentence in Kentucky for robbery.

When Jarrett and I broke out of that Cincinnati, Ohio, jail we went to Chicago, Illinois, Davenport, Iowa, Louisville, Kentucky, through the outskirts of Beaumont, Texas, and on into Houston, Texas; from Houston we went to Brownsville and over into Mexico, back to Brownsville, [fol. 302] and back to Houston, and back over into Mexico twice.

I was not working in Brownsville, Texas, nor in Mexico, nor in Houston, Beaumont, Chicago, Louisville, Davenport, either. I was only in Chicago one day and in Louisville for only about 8-hours and for a short time in Davenport. Jarrett and I went from city to city by bus.

After I broke out of jail and was fleeing from justice and moving around the country, I was not drinking regularly practically all the time; I had a few drinks every day. I did not have enough money to drink all of the time. At that time I was an "alcoholic".

If you consider Fort Worth as North Texas, it is my contention that I came to Fort Worth, after having been for some several weeks in South Texas and Mexico, around the first of February, 1950. Jarrett came over there with me. I think that Jarrett and I remained in Fort Worth for thirteen (13) or fourteen (14) days.

Jarrett and I drove from South Texas to North Texas in an automobile. Jarrett and I, according to my testimony, remained over there in Fort Worth for thirteen (13) or fourteen (14) days. I was not with Jarrett all of the time; some of the time Jarrett was somewhere else. During that time in Fort Worth Jarrett and I lived in the same house. I worked for one day while there in Fort Worth. Jarrett [fol. 303] did not work at any time.

While Jarrett and I were there in Fort Worth we did not drive over to Dallas occasionally; we came over here on February 13th, 1950. It is correct that my testimony now is that I was not in Dallas prior to February 13th, 1950. As to my having any particular reason for so testifying, I will say that I am just telling the truth. I am pretty sure that I came to Dallas on February 13th, 1950; I came over here with Jarrett.

When I then came over to Dallas I did not go to a hotel or a rooming house or seek any abode here in Dallas. I don't know where Jarrett was that night. On the day that Jarrett and I came over here to Dallas we separated when we got to Dallas or shortly thereafter and what Jarrett did or where Jarrett went I do not know; neither do I know who Jarrett saw over here in Dallas. I understand that Jarrett saw Wanda Guy and Thomas Schwartz but that is just hearsay.

I did not go to bed here that night; I think that I spent that night traveling around. As to my having spent that night drinking, I will say that that is the usual procedure in a case like that. My understanding on what the word "prowl" means would depend upon the interpretation. I went to The Colony Club, a few places around here in town. I did go from one drinking place to another.

With reference to whether I was drunk or not, I will [fol. 304] say that I don't think that I ever get too drunk.

I don't know where Jarrett was traveling around that night while I was traveling around here.

In regard to Jarrett and I having discussed on many occasions what our testimony was to be in the various trials that Tommy Schwartz has had here, I will say that Jarrett and I have been questioned in the presence of the District Attorney; my statement is, each of us in the presence of each other and the District Attorney. Jarrett was questioned by the District Attorney in my presence; I was questioned by the District Attorney in the presence of Jarrett.

With reference to whether or not Jarrett hasn't heard my testimony in the presence of the District Attorney prior to and during each of these trials, I will say that there has been no collusion of testimony. I have already told you that I heard what Jarrett told the District Attorney. In regard to both Jarrett and I being questioned by the District Attorney, on each of these trials and during each of the trials, if both of us were questioned in the presence of the District Attorney and I heard what Jarrett told the District Attorney that he would testify to, I will say that the District Attorney didn't ask us anything like that, the way that you are going to ask here.

The District Attorney did question Jarrett and I in the presence of each other; I also heard the District Attorney [fol. 305] question Jarrett; it is true that Jarrett heard the District Attorney question me; both Jarrett and I heard the questions asked by the District Attorney of both of us.

This is the third trial that I have testified in this cause.

With reference to my having testified this afternoon to the effect that Tommy Schwartz, in the spring of 1950 and on the occasion of his being out in East Dallas to meet with Jarrett and I, had told me that a man that I say was with Schwartz was an Italian from up North, down here "cooling off", I will say that I don't remember whether I did or whether Schwartz said that or not; Schwartz said that he was "cooling off" and that it was safe to bring him out there. As to this trial being the first time that I have testified to anything like that sort, I will say that this trial is the first time that I have been asked about that. I don't remember whether Mr. Wilson in his conversation

with Jarrett or in my presence with Jarrett up there ever asked that question.

In reference to whether or not I, or Jarrett in my presence, told Mr. Wilson or Mr. MacNicoll, who was in the second trial, anything about Schwartz bringing a man out there that was "cooling off" in Dallas, I will say that I don't remember; I think that we probably did but I don't remember.

In regard to whether or not I would be willing to do anything to hurt Tommy Schwartz, I will say that I wouldn't [fol. 306] say anything unless he deserved it. With reference to whether I would testify to anything that I thought would send Tommy Schwartz to the penitentiary, I will say that I am testifying to the truth. I am absolutely not in such a frame of mind and do not have such a feeling of hatred towards Tommy Schwartz that I would be willing to swear to anything that I thought would send him to the penitentiary. I am not a friend of Tommy Schwartz; he is no friend of mine.

I sure realize that Schwartz was instrumental in bringing about my arrest and the arrest of Jarrett; I knew that Schwartz had Jarrett arrested.

The robbery in question was on February 17th, 1950, and the night before that robbery I spent at the Blue Bonnet Courts. With reference to my stating to this court and jury whether or not I was drinking heavily on that night, I will say that I wasn't drinking anything that night; I was trying to pull a robbery for Schwartz, another robbery for Schwartz, and I wasn't drinking. I did have five (5) or six (6) drinks on the afternoon before the robbery; that is my testimony.

In regard to having testified on the first and second trials of this cause that I had drank a half pint just before I went out to rob the Shortals, I will say that that is five (5) or six (6) drinks.

It is correct that I testified here on direct examination that that morning I went out on Lakewood Boulevard [fol. 307] and looked the Shortal residence over, together with Jarrett. On that occasion we went up to the front door, we knocked and asked if Mrs. Shortal was in. I had not seen that house before; I did not know that that was

X
the Shortal house. Jarrett and I absolutely had not been to that house the night before.

They told us then that Mrs. Shortal was out and that she would be back home about 4:00 o'clock. We left and I went home and Jarrett has told me that he went to a moving picture show; Jarrett did not stay with me out there. I did drink a half pint of whiskey from about 11:45 to about 3:30 o'clock.

At approximately 3:45 o'clock P. M. Jarrett and I went out to the Shortal's house again; when we went there we both knew that Mrs. Shortal wasn't there; we knew that by virtue of having called on the telephone; Jarrett and I went there for the purpose of getting in before Mrs. Shortal came home; I was armed and Jarrett was armed.

When Jarrett and I went to that house a negro boy answered our knock or our ring; we asked again if Mrs. Shortal had returned and the negro boy replied that she had not. Anyhow, we wanted to leave our card for Mrs. Shortal and this negro boy took our card or he came out to get our card and I pulled a pistol on him after we got inside. We did not shove him inside of the house there; the negro boy backed up. It is right that Jarrett and I did use a pistol on this negro boy.

I don't remember that I was the first one in the house [fol. 308] there; I think that I was in there before Jarrett was but I am not sure about that. In regard to my having testified on both of the other trials that I was the first one in the house, I will say that I think that I was but I am not sure. When we all got in the house the negro maid was in that little hallway; I am not the man that drew a pistol on that negro maid, and I did not so testify in both the first and the second trials in this cause.

With reference to the following question and answer from Line 4, Page 171, of the transcript of my testimony in the first trial of this cause: "Question. After the negro boy was tied up, where were you? What were you to do?" — "Answer. While the tying up was going on downstairs, I got the maid upstairs", being correct, I will say that you are out of sequence; Jarrett took the negro maid off of the phone. That's right, that question was asked me; I did

say, "While the tying up was going on downstairs, I got the maid upstairs"; that's right.

With reference to the next question, "What?", and that I answered, "I took and put the gun on the negroes and took the maid upstairs", I will say that I don't remember to testifying to that; I think, I know, I took her upstairs but I do not think that I put the gun on her; as to whether I did or did not so testify I will say that that has been so long ago.

With respect to sequence, I will say that I have read my testimony given in the previous trials; I read it before [fol. 309] I was placed on the witness stand; I do not have the questions asked of me and the answers that I gave memorized from the previous trials. The following answer, "I took and put the gun on the negroes and took the maid upstairs", could be correct; I had a gun in my hand. A minute ago when I said that I did not put the gun on her I meant that I did not think that it was necessary and I said that I didn't do it.

Shortly after or about the time that I put the gun on the negro maid and took her upstairs Jarrett also came upstairs; Jarrett had already tied up the negro boy; I then went downstairs to look after the negro boy and, incidentally, to keep a watch out for Mrs. Shortal. With reference to my discovering when I got downstairs that the negro boy had untied himself or had not untied himself, I will say that the negro boy was gone; I don't know about him untying himself.

A moment or two after getting downstairs I saw or heard Mrs. Shortal in the back yard; I got out of her vision; she unlocked the door to her kitchen and she came into the kitchen there. I did draw a pistol on Mrs. Shortal. In regard to my having at that time been under the influence of whiskey, I will say that I had had five (5) or six (6) drinks all day.

This was a Colts Revolver and it didn't have to be on safety when I drew it on Mrs. Shortal; my gun wasn't even cocked. Jarrett then came downstairs and took hold of Mrs. Shortal there. Jarrett took Mrs. Shortal but as to whether he led her upstairs I don't know; I did not see Jarrett

[fol. 310] grab Mrs. Shortal. Immediately after Jarrett and Mrs. Shortal went upstairs I started looking for the negro butler. I did get \$24.00 out of Mrs. Shortal's purse. We also stole three (3) diamonds out there. With reference to our looking for a safe out there, I will say that that is what Schwartz told us that we would find. The reason that, during any of the previous two (2) trials, I did not testify anything to the effect that Tommy Schwartz, the Defendant, told me anything about a safe is because I wasn't then asked anything about it.

When Jarrett was arrested I was about a quarter of a block down the street; Jarrett and I were there for the purpose of getting some more money from Tommy Schwartz; I was parked in a car out there; I was parked there in an Oldsmobile automobile. What happened briefly at that corner was that Captain Fritz showed up instead of Schwartz and he arrested my partner.

I, then, immediately left town; I went to Seattle, Washington. I first went to Houston; I only remained in Houston about 2 or 3-minutes. With regard to my getting a girl just as soon as I got to Houston, I will say that I already had a girl; I did not take that girl to Seattle with me; she came out there later; she did not go with me; my testimony is that she did not go out there at the same time that I did.

I don't remember the exact date that I arrived in Seattle; [fol. 311] I got there about a week later; she arrived there about 2-weeks later. I had an apartment in Seattle, Washington.

I believe that in Seattle I went under the name of Travis Kendrick; in Dallas here I went under the name of Major Scott Travis; I used the name of Travis Kendrick in Seattle because I didn't want to use the same name that I had used here in Dallas. The name of the lady that I took out there was "Kendrick".

I was arrested out there in Seattle on the 6th day of April, 1950, I believe, and I was brought back here to Dallas, where I have since been in jail.

After the robbery I stayed here in Dallas until the following Thursday. On the day of the robbery I did register into the Adolphus Hotel here under the name of Major Scott Travis; I registered there as being from Chanute

Field, Illinois, which is an Air Base in Illinois. I remained in the Adolphus Hotel for one day and, then, I went over and I registered at The Baker Hotel under the same name, Major Scott Travis. They there didn't have a single room so I took a double room and registered under the names of "Major and Mrs. Scott Travis, Chanute Field, Chicago".

I had been in Seattle, Washington, about 3-weeks or a month when I was arrested there; I was looking for work out there.

Re-direct examination.

[fol. 312] By Mr. Wade:

The only time that I was ever charged with a criminal offense was in Ohio; other than this charge here I have only been charged that one time.

(Witness excused.)

WILLIAM TRENT JARRETT, the next witness, recalled by The State of Texas on Rebuttal, testified as follows, to wit:

Direct examination.

By Mr. Wade:

My name is William Trent Jarrett; I am the same man who testified here yesterday and this morning in this case.

I don't believe that in any of my telephone conversations with the Defendant Schwartz he told me what he told the Grand Jury about all of those guns. He did not tell me in those conversations anything concerning the guns used in the robbery; I asked him in one of those conversations if he knew where he could locate the gun and Schwartz said, "Don't worry about the gun", that he kept no record of such guns.

The pearl handled gun is the gun that I was asking Schwartz about; that's the gun that Schwartz told me not to worry about, that he had no record of it; Schwartz said [fol. 313] that he had no record of any of the guns. Schwartz told me that on the telephone.

Cross-examination.

By Mr. Hughes:

What I am testifying about now is what I was asked about previously, that is, the conversations where I was on one end down here in the Sheriff's Office with the District Attorney and Schwartz was on the other end; that is the same conversation that I have talked about being recorded.

(Witness excused.)

J. E. SELLERS, the next witness called by The State of Texas on Rebuttal, having first been duly sworn, testified as follows. to wit:

Direct examination.

By Mr. Wade:

My name is J. E. Sellers; my business is the making of records and transcriptions for all purposes; I have been exclusively in that business for 15-years; my place of business is at 905½—Main Street. In March, 1950, I was in [fol. 314] that business.

At that time the then District Attorney did employ me to make some recordings of telephone conversations; those were made in the Sheriff's room, just behind the Sheriff's Office, where Bill Binford's office is.

I met William Trent Jarrett at that time; I was present there when Jarrett made certain telephone calls to the Defendant, Tommy Schwartz; I had a recording setup set up in there recording what went on; I also listened to the conversation as it was recorded.

This State's Exhibit, No. 4, that you have shown me here is one of the "sides" that we recorded on March 18th, 1950. That (indicating) truly reflects the conversation that took place on that telephone between the Defendant Schwartz and William Trent Jarrett.

This State's Exhibit, No. 5, that you have shown me here is also one of those Schwartz records; that (indicating) was made on March 19th, 1950; it was recorded under the same

circumstances; it truly reflects the conversation that is shown there, on the telephone between the Defendant Schwartz and Jarrett.

This State's Exhibit, No. 6, that you have shown me here is also another one of those Schwartz records that was recorded at that time; that record truly reflects the conversation that took place between the Defendant Schwartz and [fol. 315] Jarrett on the telephone on that date.

This State's Exhibit, No. 7, that you have shown me here is also another one of those Schwartz records that was recorded at that time; it also truly reflects the conversation that took place on that date between Jarrett and the Defendant Schwartz.

This State's Exhibit, No. 8, that you have shown me here is also another one of the series of the Schwartz records; that also truly reflects the conversation that took place on the telephone between the Defendant Schwartz and Jarrett.

This State's Exhibit, No. 9, that you have shown me here is also another one of those Schwartz records; it also truly reflects the conversation that took place on the telephone between the Defendant Schwartz and Jarrett.

All of these State's Exhibits, Nos. 4, 5, 6, 7, 8 and 9, were recorded by me in the Sheriff's Office; I heard those conversations on the telephone myself; they all truly reflect everything that was said by each of them and it is on the recording.

Cross-examination.

By Mr. Hughes:

I recorded around a dozen (12) conversations there; I don't recall now exactly how many of these conversations [fol. 316] that I did record there; it might have been as many as fifteen (15) of them; they were numbered from No. 1 on up to wherever they stopped. As to these (indicating Exhibits 4, 5, 6, 7, 8 and 9 for The State) being only six (6) out of however many of the conversations that I recorded, I will say that the District Attorney has done the selecting and I don't know which ones he selected. I think that State's Exhibits Nos. 4, 5, 6, 7, 8 and 9, do not include all

of the recordings made; they do not include No. 1, 2, 3, 10, 11, 12 and on up. In other words, these are not a complete record of everything that took place in all of the recorded conversations.

I do not know who was doing the directing and the recording on the other end of the line where Schwartz was talking from. With reference to my knowing that Jarrett was talking for the District Attorney and his Assistants who were sitting there on this end of the line, I will say that I don't know who Jarrett was talking for; I know that Jarrett talked.

A part of the time while these conversations were being recorded the District Attorney was there and the work of the office was going on there; that was not the work of the District Attorney's office; that was not done in his office; it was in that room down there just back of the Sheriff's Office; it was not up in the jail; it was down there in the Sheriff's Office.

I had set this up in that room down there and I presume [fols. 317-334] that Jarrett was brought down to talk so that I could get it and record it down there; Jarrett came down there; he came in there. I don't know who Jarrett was escorted by; there were other people in there that I didn't know who they were; I was just there performing a professional service. That is the reason that I don't know about that. I did know that Jarrett was a prisoner.

I know the then District Attorney, Mr. Wilson; he was in there a part of the time; as to which of Mr. Wilson's Assistants were in there I will say that I am not certain that I know who any of the others in there were. At times there were more than we three (3) people in there. I would not say that at all times in there there was some member of the law enforcement officers and from the District Attorney's Office but I think so. These (indicating recordings) are just six (6) recordings out of the twelve (12) or fifteen (15) that were made down there.

(Reporter's Note: At this time telephone recordings, previously identified as State's Exhibits Nos. 4, 5, 6, 7, 8 and 9, were introduced in evidence as: State's Exhibits Nos. 4, 5, 6, 7, 8 and 9, and same are shown in this transcript commencing with the next page, Page No. 218).

Clerk's Note: State's exhibits Nos. 4 to 9 inclusive appear in Defendant's Bill of Exception No. 1 and are not repeated here.

[fol. 335] Redirect examination.

By Mr. Wade:

I have now heard these recordings, State's Exhibits, Nos. 4, 5, 6, 7, 8 and 9, played back here before this jury; as to those records truly reflecting the conversations that took place between the Defendant Schwartz and Jarrett on those particular dates, I will say that it is an exact reproduction of it.

Re-cross-examination.

By Mr. Hughes:

I don't know where records, Nos. 1, 2, 3, 10, 11, 12, 13, 14 and 15 are. I don't know anything about any other recordings having to do with the arrest of Bennett, out there in Seattle, Washington.

(Witness excused.)

The State closes.

Defendant closes.

Testimony closed.

Finis.

[fol. 336] THE STATE'S EXHIBIT, No. 1

(Reporter's Note: This Exhibit is the first gun, according to testimony of Jarrett, that he bought from Defendant, being swapped in on State's Exhibit, No. 2. Due to size, etc., of this Exhibit, same is not attached to this Statement of Facts.)

[fol. 337] THE STATE'S EXHIBIT, No. 2

(Reporter's Note: This Exhibit is the second gun, according to the testimony of Jarrett, that he got from Defendant, gotten in exchange for State's Exhibit, No. 1. Due to

size, etc., of this Exhibit, same is not attached to this Statement of Facts.)

[fol. 338]

THE STATE'S EXHIBIT, No. 3.

(Reporter's Note: This Exhibit is the clip for State's Exhibit, No. 2. Due to size, etc., of this Exhibit, same is not attached to this Statement of Facts.)

(Here follows Photograph, side folio 339)

THE STATE'S EXHIBIT, NO. 11

<p><i>Went</i></p> <p>THE WESTERN UNION TELEGRAPH COMPANY MONEY ORDER W. P. MARSHALL, PRESIDENT</p>		<p>72-A</p>
ACCTS. INPN.	SENDING DATA	
<p>Send the following money order subject to conditions below and on back hereof which are agreed to:</p>		<p>1950 MAR 2 PM 4 48</p>
<p>MOD</p>		<p>CHECK</p>
		<p>TIME FILED</p>
		<p>DATE 19__</p>
AMOUNT	<p>OFFICE DALLAS TEXAS</p>	
PAY TO	<p>DATE</p>	
STREET ADDRESS	<p>PRINT AMOUNT DOLLARS</p>	
DESTINATION AND SENDER	<p>FIGURES</p>	
MESSAGE TO BE DELIVERED WITH MONEY ORDER	<p>PLEASE PRINT, IF WOMAN GIVE MRS. OR MISS</p>	
	<p>DESTINATION</p>	
	<p>SENDER</p>	
	<p>ADDRESS</p>	

Unless signed below the Telegraph Company is directed to pay this money order to the person as its paying agent believes to be the above named person, personal identification being waived.

2408 ELM ST

formation for test question:

APR 21 1950

7470

Photostat 10

(211A)
Pt. 1

MONEY ORDERS ARE SUBJECT TO THE FOLLOWING CONDITIONS:

Domestic orders will be canceled and refund made to the sender if payment cannot be effected within 72 hours after receipt at paying office (Ellis Island, N. Y., excepted). Orders payable at Ellis Island will be canceled after the expiration of five days.

In the case of a foreign order the foreign equivalent of the sum named in the order will be paid at the rate of exchange in effect on the New York, N. Y., or San Francisco, Calif., market at the time the order is sent from New York, N. Y., or San Francisco, Calif., as the case may be.

In the case of a foreign order the equivalent, in the currency of the country of payment, of the sum named will be purchased promptly and if for any reason payment cannot be effected, refund will be made by the Company and will be accepted by the depositor at the market value of such foreign currency in American funds, at New York, N. Y., or San Francisco, Calif., as the case may be on the date when notice of cancellation is received there by the Company from abroad.

When the Company has no office at destination authorized to pay money, it shall not be liable for any default beyond its own lines, but shall be the agent of the sender, without liability, and without further notice, to contract on the sender's behalf with any other telegraph or cable line, bank or other medium, for the further transmission and final payment of this order.

In any event, the Company shall not be liable for damages for delay, non-payment, or underpayment of this Money Order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the amount of underpayment, if any, and other actual loss, the liability for which other actual loss in any event shall not exceed the sum of five hundred dollars, at which amount the sender represents that the right to have this Money Order promptly and correctly transmitted and promptly and fully paid is valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

In the event that the Company accepts a check, draft or other negotiable instrument tendered in payment of a Money Order, its obligation to effect payment of the Money Order shall be conditional and shall cease and determine in case such check, draft or other negotiable instrument shall for any reason become uncollectible, and in any event the sender of this Money Order hereby agrees to hold the Telegraph Company harmless from any loss or damage incurred by reason or on account of its having so accepted any check, draft or negotiable instrument tendered in payment of this order.

incurred by reason or on account of its having so accepted any check, draft or negotiable instrument tendered in payment of this order.

(216A Part 2)

**ALL MESSAGES INCLUDED IN MONEY ORDERS ARE SUBJECT
TO THE FOLLOWING TERMS:**

To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the un-repeated message rate is charged in addition. Unless otherwise indicated on its face, this is an un-repeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the un-repeated-message rate beyond the sum of five hundred dollars; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the repeated-message rate beyond the sum of five thousand dollars, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines.

2. In any event the Company shall not be liable for damages for mistakes or delays in the transmission or delivery, or for the non-delivery, of any message, whether caused by the negligence of its servants or otherwise, beyond the actual loss, not exceeding in any event the sum of five thousand dollars, at which amount the sender of each message represents that the message is valued, unless a greater value is stated in writing by the sender thereof at the time the message is tendered for transmission, and unless the repeated-message rate is paid or agreed to be paid and an additional charge equal to one-tenth of one per cent of the amount by which such valuation shall exceed five thousand dollars.

3. The Company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other company when necessary to reach its destination.

4. No responsibility attaches to this Company concerning messages until the same are accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

5. The transferring of the money and the transmission of the message together constitute one transaction and the cancellation by either the sender or the Company of the Money Order cancels also any obligation on the part of the Company to deliver the message. The message will be delivered to the payee of the Money Order only as and when the money is paid.

6. The Company will not be liable for damages or statutory penalties in the case of any message except an intrastate message in Texas where the claim is not presented in writing to the Company within sixty days after the message is filed with the Company for transmission, and in the case of an intrastate message in Texas the Company will not be liable for damages or statutory penalties where the claim is not presented in writing to the Company within ninety-five days after the cause of action, if any, shall have accrued; provided, however, that neither of these conditions shall apply to claims for damages or overcharges within the purview of Section 415 of the Communications Act of 1934.

7. It is agreed that in any action by the Company to recover the tolls for any message or messages the prompt and correct transmission and delivery thereof shall be presumed, subject to rebuttal by competent evidence.

8. No employee of the Company is authorized to vary the foregoing.

339

216A

[fol. 340] THE STATE'S EXHIBIT, No. 13

(Reporter's Note: This Exhibit is the Brevetti semi-automatic pistol identified by witness, Lester Emmett Bennett, during his testimony.)

(Here follow 2 Photograph, side folios 341, 342)

THE STATE'S EXHIBIT, NO. 14

(W U Money Order)

**THE PROSECUTOR'S
OFFICE**

Handwritten: **Handwritten**

Handwritten: **Passes**

Handwritten: NON TELLER

MAR 3 50 0502

Photostat to

Date APR 21 1960

(218A
Pt. 1)

WESTERN UNION MONEY ORDER

3271
1110

ISSUED AT Main Houston, Texas

FEB 2 19 50

When Countersigned
at Point of Issue PAY TO

LOUISE KENDRICK

ON ORDER

THE SUM OF FORTY EIGHT AND 57/100 - - - - - DOLLARS \$ 48.57

TELEGRAPHED FROM DALLAS TEX MAR 2 19 50

ORIGINATING POINT

DATE

FM T. J. STEWART

NUMBER NM88782

WESTERN UNION
BANK IN DALLAS
TEXAS

COUNTERSIGNED

THE WESTERN UNION TELEGRAPH COMPANY

Evelyn R. ...

THIS ORDER MAY BE CASHED BY ANYONE TO WHOM THE PAYEE IS KNOWN

JACK K. TINGLE
OFFICIAL COURT REPORTER
CRIMINAL DISTRICT COURT NO. 2
DALLAS 2, TEXAS R-3327

341

218A
(P12)

DEFENDANT'S EXHIBIT, NO. 1

RAILWAY EXPRESS AGENCY
INCORPORATED

Receipt For Charges Collected From Consignee

To Destination Office

Dallas, Tex.

Receipt Number

962803

Consignee

Special Address of Non Agency Destination

Enter Date Shipped

Advance

Permitted

Value Declared

Value Charge

Title

Article

Description

Weight

Regulation Charge

AIR EXPRESS

Shipper

Class

Paid in Part

Total

Place of Origin

Scale or Rate

Verified by

C. O. D.

Received payment for the Company.

Date Delivered

C. O. D. Service Charge

(2001)
(2-49)Show any additional charges on reverse side
Printed in U.S.A. with explanation.

10

TOTAL

How

M

JACK K. TINGLE
OFFICIAL COURT REPORTER
CRIMINAL DISTRICT COURT NO. 2
DALLAS 2, TEXAS R-3327

[fol. 343] Reporter's Certificate to foregoing paper omitted in printing.

STIPULATION OF ATTORNEYS APPROVING STATEMENT OF FACTS

We, the attorneys for The State of Texas and the Defendant, respectively, hereby agree that the above and foregoing 242-pages contain and constitute a true and accurate Statement of Facts in said cause.

Witness our hands, this, the 8th day of June, A. D., 1951.

Henry Wade, Criminal District Attorney, Dallas County, Texas, James MacNicoll, Assistant District Attorney, for the State of Texas, R. A. L. Stokes, [fol. 344] Asst. Dist. Atty., Hughes & Monroe, by Maury Hughes, T. F. Monroe, for the Defendant.

JUDGE'S APPROVAL TO STATEMENT OF FACTS

The above and foregoing Statement of Facts, certified to by the Official Court Reporter and agreed to by the attorneys for The State of Texas and the Defendant, having been presented to me, same is examined, approved and ordered filed as the Statement of Facts in this cause.

This, the 8th day of June A.-D., 1951.

Henry King, Judge, Criminal District Court, No. 2, Dallas County, Texas.

[fol. 345] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 346] IN COURT OF CRIMINAL APPEALS OF THE STATE
OF TEXAS, AUSTIN, TEXAS

Appeal from Dallas County

No. 25,458

THOMAS SCHWARTZ, Appellant

v.

THE STATE OF TEXAS, Appellee

OPINION—November 14, 1951

The offense is that of being an accomplice to the crime of robbery; the punishment, ninety-nine years.

One Jarrett and one Bennett, both escapees from an Ohio jail, came to Dallas a few days before February 17, 1950. On that day, after preparations which will be hereinafter shown, they went to the home of Dr. Shortal in that city, gained admittance by the use of firearms, tied up the servants and waited for Mrs. Shortal's return. When she did return, at pistol point she was forced to surrender her diamond rings and then locked in a closet. After leaving the Shortal residence, Jarrett and Bennett went to the pawnshop of appellant and left the diamond rings with him. They received a small amount of money, in comparison to the value of the jewelry, and expected appellant to dispose of the jewelry and compensate them further. Of these facts there seems to have been no controversy.

At the trial of appellant, Jarrett and Bennett both testified for the State and, in addition to the above, told of having entered into a conspiracy with appellant to commit a series of robberies, of having received arms and information as to whom to rob from appellant, and of having in accordance with this conspiracy performed the Shortal robbery and carried to him the fruits thereof for disposal and a division of the proceeds among the three of them.

Appellant denied the conspiracy and claimed that he received the diamonds as an innocent purchaser for value.

We shall attempt to discuss the questions presented by appellant in the order advanced.

[fol. 347] Our attention is first directed to appellant's claim that there is no evidence other than the testimony of the two accomplice witnesses which tends to connect him with being an accomplice to the commission of the offense, and that their testimony is not sufficiently corroborated.

Jarrett told of purchasing a pistol from appellant at his pawnshop and returning it the next day because it would not fire. On this occasion, appellant remarked to Jarrett; "If you had a partner to work with, you might be able to make a good score." Thereupon, Jarrett introduced Bennett to appellant; and the three of them worked out a division of any spoils they might acquire by virtue of robberies contemplated, wherein appellant was to furnish the name of the party to be robbed, Jarrett and Bennett were to commit the robbery and bring the fruits thereof to appellant for disposal. An equal division of the proceeds was agreed upon.

At this juncture, appellant sent his assistant, a colored boy named Davis, up to the third floor to test the new gun being furnished Jarrett and which was later used in the Shortal robbery. Davis testified in corroboration as to this fact and, further, that at the instance of appellant following the Shortal robbery, he delivered fifty dollars to Jarrett in person and sent a second fifty dollars under a fictitious name to Houston. This was shown to have been received by Bennett. Davis further testified that he saw Jarrett and Bennett in the pawnshop in company with appellant on another occasion prior to the Shortal robbery.

Jarrett testified that on the morning of the robbery, and in preparation therefore, appellant in the presence of Jarrett and Bennett called the Shortal Clinic to ascertain whether Dr. Shortal had left home. This was done so that they would not encounter Dr. Shortal when they went to rob his home.

Miss Kate Graham, the receptionist at Dr. Shortal's Clinic, corroborated Jarrett as to such a telephone call, [fol. 348] as will be seen in our discussion of Bill of Exception No. 4.

In addition to the above, we find two telling portions of evidence tending to show appellant's connection with the fruits of the robbery after the same had been committed.

The witness Graham testified that some time following the robbery she received an anonymous telephone call at the Clinic making inquiry as to a reward for the missing diamonds. Immediately thereafter, at the suggestion of the police, she called appellant at his place of business and positively identified his voice as being the one that had made the reward inquiry.

We further find the testimony of the witness DeWitt, an insurance adjuster from whom the appellant made surreptitious inquiry concerning the reward for the return of the Shortal diamonds following the robbery and their delivery to him for disposal by Jarrett and Bennett.

We feel that the recorded telephone conversations between Jarrett and appellant hereinafter discussed under Bill of Exception No. 1 corroborate Jarrett's and Bennett's version of the transaction and disprove appellant's defense.

Bill of Exception No. 1 complains of the playing before the jury of such records of conversations between the witness Jarrett and the appellant. These records were made in the Sheriff's office at the suggestion of the District Attorney for the purpose of securing evidence against appellant. Jarrett was then a prisoner and cooperated with the officers in making out the State's case. The medium of their communication was the telephone, Jarrett being in the Sheriff's office and appellant being at his pawnshop.

Illustrative thereof is an answer made by Schwartz to questions by Jarrett concerning securing the services of a lawyer and how much information the police had about the guns used in the robbery, when he said, " * * * you sit in [fol. 349] the boat and we will get along better. There's no use of ten people drowning when one can drown and one can help the other."

Appellant leveled nine objections to the evidence, of which we will discuss those urged in his brief.

Appellant sought to invoke the terms of Section 605 of Title 47, U. S. Code Annotated; Telegraphs, Telephones and Radiotelegraphs, commonly referred to as the Federal Communications Act, by claiming that he did not consent to the making of the recordings or to their introduction in

evidence and cites us opinions in several cases arising in Federal Courts.

Without holding this evidence to have been obtained in violation of Section 605, we address ourselves rather to the question of the applicability of a Federal procedural statute to a trial in a State Court.

Prior to 1929, the statute, now Article 727a, Vernon's Code of Criminal Procedure, read,

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, *or of the United States of America*, shall be admitted in evidence against the accused on the trial of any criminal case."

It now reads,

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, *or of the Constitution of the United States of America*, shall be admitted in evidence against the accused on the trial of any criminal case."

In 1930, we said in *Montalbano v. State*, 34 S. W. (2d) 1100:

"* * * Article 727a, C. C. P., was amended so as to no longer require rejection of evidence obtained in violation of laws of the United States. There is no claim that the evidence was obtained in violation of any law of this State."

This evidence was not obtained in violation of the State or Federal Constitution or the statutes of Texas and was here admissible as against this objection.

[fol. 350] Appellant next complains that the phonographic records were secondary evidence and that Jarrett himself was the source of the best evidence. We are cited no authorities. It appears to us that the complaint is not well taken.

Bill of Exception No. 4 complains that the witness Graham was permitted to testify as to having received an anonymous telephone call.

This testimony was in corroboration of the accomplice Jarrett, who had, prior to the receipt of the Graham evidence, testified that he was present when appellant called her on the telephone and told these details of the conversation, which she corroborated:

1. That the call was made in the morning of the day of the robbery.
2. That it was made to Dr. Shortal's Clinic.
3. That the person calling inquired about the whereabouts of Dr. Shortal and told of an alleged automobile accident between Mrs. Shortal's car and that of the caller.
4. The refusal of the caller to give his telephone number.

From this we conclude that the trial court was possessed of sufficient facts to cause him to believe that the two witnesses were talking about the same conversation and that the witness Graham was corroborating the witness Jarrett. Though not conclusive, this was certainly persuasive of the fact that Jarrett spoke the truth.

In 22 Corpus Juris Secundum, Section 644, page 984, we find the following:

"Telephone Conversations

"The completeness of the identification goes to the weight of the evidence, and not to its admissibility. Whether evidence of a telephone conversation is admissible rests in the discretion of the trial court.

"It has been said the rule does not define any one method or way of making a telephone conversation [fol. 351] admissible; and there is no rule of evidence which requires that every witness to a conversation shall himself identify the participants in it, identification by others being considered sufficient. Although it has been said that ordinarily the witness must recognize the declarant's voice, it has been held that it is not imperatively necessary that the voice of the person talking be recognized by the other party to the conversation. The requisite identity may be established by a third person listening to such conversation."

Bill of Exception No. 6 complains of two separate and distinct rulings of the Court:

1. Permitting the witness Bennett to testify about a certain pistol which he received from appellant.
2. The failure of the Court to grant appellant's requested charge concerning such testimony.

So framed, the bill complains of two matters, is therefore multifarious and presents nothing for review.

Appellant, in his Bill of Exception No. 5, seeks to raise a question that, by proving the method of division agreed upon among the thieves, the State proved another extraneous and substantive crime; to wit, conspiracy to commit a crime. We do not think the objections made at the time raised the question. However, we go further and say that such a holding would preclude the State from making out its case involving an accomplice as in the case at bar, because in so doing another offense would have been shown.

The witness Jarrett, in recounting the general working agreement made between the thieves prior to any discussion of the Shortal robbery, was asked, "At that time did you make any agreement between you and Bennett and Schwartz—make any agreements as to the distribution of properties taken in robbery?" His answer was, "Yes, we did. After we discussed the fine points and got down to splitting up of any loot on any of the robberies, he said, 'You go along with me and I will go along with you fellows, and we will split one-third ($\frac{1}{3}$ rd) on all robberies——' one-third ($\frac{1}{3}$ rd) on all robberies——"

[fol. 352] When the question of the Shortal robbery was later raised, it was unnecessary for them to have a separate arrangement for the division of the spoils thereof, because this understanding had already been reached. An accurate recounting of the facts made this particular type of proof necessary.

The bill does not reflect that the jury heard any further mention of extraneous offenses other than that the plural "robberies" was used, as shown above. It appears to us that the careful trial judge limited the State's proof in this respect. The agreement entered into, though it embraced other crimes, was legitimate proof.

We do not feel that the bill reflects error.

Bill of Exception No. 3 complains that appellant was not permitted to recount a conversation he had with one Fink, who was not offered as a witness, in order to more fully make explanation of his recent possession of stolen property. The Court's qualification shows conclusively that appellant's agreement with Fink concerning the disposition of the diamonds had been fully covered in other portions of the testimony of the witness. We find nothing material in the excluded hearsay testimony not covered by that actually admitted in evidence.

Bill of Exception No. 2 contends that appellant was deprived of the opportunity to prove that his assistant tested all firearms by shooting them out of the window before a sale, or "lease" in the terminology of the pawnshop, was consummated. An examination of the statement of facts shows that such evidence was actually adduced from the same witness when he was permitted to testify, "My purpose in going up there was to try the gun out to see if it would shoot all 'right; we do that whenever we 'lease' them." Hence the bill shows no error.

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, Judge.

(Delivered November 14, 1951.)

[fol. 352-A] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 353] IN COURT OF CRIMINAL APPEALS OF THE STATE
OF TEXAS

[Title omitted]

MOTION FOR REHEARING

To the Honorable Judges of said Court:

Comes now the appellant, Thomas Schwartz, and represents to this Court that his original appeal was overruled on November 14, 1951, and that he now files this, his Motion

for Rehearing, and represents that this Honorable Court fell into error in the following particulars:

I

The main and particular question involved in this case is as to whether or not Section 605 of the Federal Communications Act (Title 47 USCA) prohibits the interception of telephonic communications in *intra* state commerce.

In a lengthy opinion by this Court, Morrison, J., the Court made the following observation:

[fol. 354] "Without holding this evidence to have been obtained in violation of Section 605, we address ourselves rather to the question of the applicability of a Federal procedural statute to a trial in a State court."

We now respectfully ask this Honorable Court to boldly state whether or not Article 605 is applicable to telephonic communications in *intra* state commerce.

The author of this brief is cognizant of the previous statutes passed by the State of Texas and referred to in particular by this Honorable Court in the case of *Montalbano v. State*, 34 S. W. (2d) 1100. We respectfully call Your Honor's attention to the fact that these State laws and this decision were effective prior to the passage by the Congress of Article 605.

The plain and simple question is—does Article 605 supersede the preexisting laws of this State. It is appellant's contention that the case of *U. S. v. Polakoff*, 112 Fed. (2) p. 888, decides this question. Many cases are discussed and analyzed in this decision as well as a complete discussion of the effect of Article 605.

We again respectfully ask this Court to review the cases of *Sablowsky v. U. S.*, 101 Fed. (2d), p. 190; *Weiss v. U. S.*, 308 U. S. Supreme Court Reports, 8; *McGuire v. Atlantic Coast Ry. Co.*, 118 S. E., 225, as well as the many authorities cited in appellant's brief.

This Honorable Court places some stress upon the change in statutory language to justify its finding. It would appear that the change in language does not compel the re-

sult reached. Fundamental rights are not to be lightly taken, nor briefly considered. One State statute in question, Article 727a, Vernón's Code of Criminal Procedure, indicates the legislature's intent to give to our citizens every protection from the excesses of overzealous law officers. That such a statute should even have been necessary indicates that fundamental rights were being violated. It can [fol. 355] not be presumed that the legislature so intended the change without some specific manifestation of intent, since the omission could have been purely inadvertent. To permit such encroachments upon fundamental rights is to mock the spirit of both the Constitutions of the State of Texas and of the United States of America.

Even if it be assumed that such was the intent of the legislature, the Court has made the statement that "This evidence was not obtained in violation of the Constitution of the State of Texas . . ." without having given due consideration to the effect of such a holding. If Section 9, Article I, of the Constitution of the State of Texas is to be more than mere empty words, then the Court must consider the factors which underlie this provision and the purposes for which it was intended. We cannot presume it to be mere surplusage. Nor can we assume the provision to be merely directory. If it is to have any meaning, it must be mandatory. Hence, even if the Court's interpretation of the statutory change is valid, the evidence was nevertheless obtained in violation of defendant's constitutional rights under the Constitution of the State of Texas, Section 9, Article I, and was inadmissible for that reason.

Moreover; even if the Court's position with regard to evidence obtained in violation of a Federal statute were correct, it is not shown that no violation of the Federal Constitution occurred. It is urged herein, and our brief will further document our position in that regard, that said evidence was obtained in violation of the Federal Constitution and for that reason was not admissible in the case at bar. The cases following the *Olmstead* case have so cut away the foundation of that case that it cannot be said that the *Olmstead* case is still the law of the land. In effect, the *Olmstead* case has been sub silentio overruled and cannot be taken as the expression of the Supreme Court of the United

[fol. 356] of the United States as to the prevailing exposition of constitutional doctrine.

In the light of the foregoing, it is clear that the Court of Criminal Appeals has erred in sustaining the trial court's admission of the recorded conversations and that upon the rehearing hereof, the Court should reverse the conviction upon the grounds that said evidence was obtained in violation of defendant's constitutional rights and is not admissible evidence since it contravenes the provisions of Article 727a, *supra*, and upon the broader ground that no evidence obtained in violation of a defendant's constitutional rights should be admissible in evidence; otherwise, the framework of our protection under law becomes subject to the whim or caprice of elected officials who cannot be said to be infallible when they in the interest of their duties become overzealous and tyrannical.

II

This Honorable Court in passing on Appellant's Bill of Exception No. 6, which appears on page 93 of the transcript, brushes same aside without consideration with the following observation:

"Bill of Exception No. 6 complains of two separate and distinct rulings of the Court:

1. "Permitting the witness Bennett to testify about a certain pistol which he received from appellant."
2. "The failure of the Court to grant appellant's requested charge concerning such testimony."

"So framed, the bill complains of two matters, is therefore multifarious and presents nothing for review."

May we, with all due respect to this Court, make this observation: "Multifarious" means the presentation of two separate and distinct propositions of law in one bill of exception. This rule, which is recognized by every experienced practitioner, is to avoid confusion, promote clarity and present one proposition of law to the court in one [fol. 357] bill of exception, same being on the same subject matter. Now, what do we have here? Two subject matters or just one simple proposition of law?

The appellant complained of the introduction of a pistol in evidence which everyone, including the Court, agreed played no part; that is, was not used in the robbery. It was a pistol which the robber Bennett claimed was given him *after* the robbery by appellant. The bill of exception reveals that the appellant vigorously objected to this display of a "plastic-handled, semi-automatic pistol" before the jury. This physical testimony was more damaging than either Jarrett or Bennett could concoct.

Now we come to the point as to whether this bill of exception (No. 6) is "multifarious". At the conclusion of the testimony the appellant, by a special requested charge, asked the Court to withdraw the testimony (the introduction of this pistol) from the consideration of the jury and not to consider same for any purpose. The request was refused and excepted to. Now, in his bill of exception, appellant recites the objection taken and sets out his requested charge. The trial court in his qualification makes no complaint that said bill is "multifarious." In fact, he in substance certifies that this is all one transaction, involving one question of fact and one proposition of law. All this appellant did was use every precaution to protect himself against one piece of damaging evidence.

A "multifarious" bill is one that presents two separate and distinct propositions of law growing out of different transactions.

In "Words and Phrases", permanent addition, Vol. —, page 718, the Court will find fifty cases bearing out appellant's theory.

[fol. 358] Appellant respectfully requests that this Honorable Court consider this bill on its merits, believing that same presents reversible error.

III

Appellant presents this proposition to the Court: that he was convicted of an offense not charged in the indictment, to-wit, as principal to a robbery wherein he was charged as being an accomplice. This question was not raised by the motion for a new trial, and it was first brought to appellant's attention by one of the honorable members of this Court during oral argument on its original presentation.

The question is this: the defendant was indicted and charged with being an accomplice to a robbery. The State took the position and this Honorable Court, speaking through Judge Morrison, took the position, that the defendant was a principal to robbing Mrs. Minnie Shortal, in that he conspired to commit a robbery with two robbers known as Jarrett and Bennett, and by a preconceived plan that Jarrett and Bennett were to bring the jewels to appellant's pawn brokerage establishment for illegal disposition. Throughout the trials (there having been three) the State took the position that the appellant was a principal, although being charged as an accomplice. Being fundamental, appellant now raises the question that he was indicted for one offense and convicted of another. It may be stated that those appearing for the State took the position that he was a principal and, under direct questioning of this Court, stated in their judgment that to be an accomplice it was necessary for him to be absent at the time of the perpetration of said offense. The theory of the State is contrary to the decisions of this Court, and may we quote as follows: *Cooper v. State*, 154 S. W., 989; *Silvas v. State*, 159 S. W., 223, and *Serranto v. State*, 171 S. W., 1133. *Barnett vs. State*, 117, S. W. 110; *Hill vs. State*, 121 S. W. 996.

The unprecedented authorities of our commonwealth hold that a man charged with one offense cannot be convicted of [fol. 359] another.

For this, and the many other reasons assigned, this case should be reversed.

To Your Honors we submit that we have not had time to express fully our views on the legal opinion rendered by Judge Morrison, but on the question of telephonic conversations which His Honor recites as a precedent in 22 C. J. Secundum, Section 644, p. 94, is wholly inapplicable to the case at bar. This section applied to unidentified conversations which, with this Court's permission, we will present in the form of a brief.

Appellant complains of certain other rulings of this Court, all of which will be presented in oral argument and in the form of a brief.

For consideration of the matters presented in this Motion for Rehearing, appellant respectfully thanks this Court.

Respectfully submitted, Hughes & Monroe, By Maury Hughes, Attorneys for Appellant.

[fols. 360-402] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 403] IN COURT OF CRIMINAL APPEALS OF THE STATE
OF TEXAS

Appeal from Dallas County.

No. 25,458

THOMAS SCHWARTZ, Appellant,

v.

THE STATE OF TEXAS, Appellee.

OPINION ON MOTION FOR REHEARING—January 30, 1951

Appellant has filed two lengthy briefs in this court asking for a rehearing herein and for a reversal of this cause, all of which are but a reiteration of his original brief and argument with the exception of one claimed newly discovered point which was not offered in the first hearing in this matter:

We adhere to our views as expressed in the original opinion herein and will attempt to write briefly on the new proposition which is raised, as follows: It is claimed that appellant, who was charged herein as an accomplice to robbery, under the facts, should have been charged as a principal rather than as an accomplice.

We are of the opinion that the facts, as presented here, to a certain extent, would bear out appellant's contention relative to his principalship except for the fact that there seem to be lacking cogent elements of a principalship, as follows: (1) the actual presence of the accused on the scene of the robbery at the time of the commission of the offense, and (2) the actual performance of an act by the appellant relative to such conspiracy at the time of the commission of such robbery. Herein, it is not shown that he was present, or kept watch, or that he did any act in furtherance of the

robbery at the time of its commission so as to make him a principal therein. As we see it, the question as to the constructive presence of the appellant is not in the case.

Article 69 of the Penal Code reads as follows:

"Any person who advises or agrees to the commission of an offense and *who is present* when the same is committed is a principal whether he aid or not in the illegal act." (Italics supplied)

[fol: 404] Article 70 of the Penal Code reads as follows:

"An accomplice is one *who is not present* at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense; or

.

"Who prepares arms or aid of any kind, prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same." (Italics supplied)

Under the facts of this case, we find appellant at the time of the commission of the offense busily engaged in his place of business and daily avocation where he usually stayed. Appellant seems to have been doing absolutely nothing in furtherance thereof at the time of the commission of this offense, and was surprised by the rapidity with which the two thieves had executed that which he had previously commanded and encouraged them to do in the commission of such offense.

The charge here alleged is that the appellant, though not present at the time of the commission of the offense, had prior thereto advised, commanded and encouraged others to commit it. The proof established the charge, and also established that in accordance with the conspiracy agreement, the appellant received the fruits of the crime and had control over their disposition, except that the co-conspirators were to share in the fruits of the sale after the disposition of the stolen property; and the cited case of *Johnson v. State*, 206 S. W. (2d) 605, holds that in such event the accused was an accomplice rather than a principal.

Believing that appellant was correctly charged and proven as an accomplice, the motion for a rehearing will be overruled.

Graves, Presiding Judge.

(Delivered Jan. 30, 1951.)

[fol. 405] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 406] IN COURT OF CRIMINAL APPEALS OF THE STATE
OF TEXAS

[Title omitted]

ORDER—February 12, 1952

The application of Thomas Schwartz for a stay of issuance of the mandate in this cause is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of the mandate and all other proceedings upon the judgment against the appellant for a period of ninety (90) days from this date in order that he may apply to the Supreme Court for a writ of certiorari.

And the Clerk is further directed that in the event the writ is granted by the Supreme Court of the United States that the issuance of the mandate be delayed until final action by that Court upon the matter.

This 12th day of February, A. D., 1952.

H. U. Graves, Presiding Judge, Court of Criminal Appeals of Texas. (Seal.)

A true copy.

Attest: Glenn Haynes, Clerk, Court of Criminal Appeals

[fol. 407] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 408] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951

No. 730

THOMAS SCHWARTZ, Petitioner,

VS

STATE OF TEXAS

ORDER ALLOWING CERTIORARI—Filed June 9, 1952

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2432)

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.

FILED

APR 22 1952

CLARK

No. ~~230~~ 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THOMAS SCHWARTZ, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

**Petition for a Writ of Certiorari to the Court of
Criminal Appeals of the State of Texas**

MAURY HUGHES

Republic Bank Building
Dallas, Texas

REUBEN M. GINSBERG

Texas Bank Building
Dallas, Texas

Counsel for Petitioner

INDEX

	Page
Opinion below	2
Jurisdiction	14
Question presented	15
Statutes involved	15
Statement of the case	16
Specification of errors to be urged	18
Reasons for granting this writ	19
Conclusion	30
Appendix	
A. Statutes	31

CITATIONS

Cases:

Boske v. Comingore, 177 U.S. 459, 20 S. Ct. 701 (1900)	26
Bowles v. Angelo, 188 S. W. 2d 691 (Tex. Civ. App. 1945)	21, 22
Claflin v. Houseman, 93 U. S. 130, 23 L. Ed 833	21, 22
Erie v. Thompkins, 302 U.S. 671, 58 S. Ct. 50, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed 1188	29

CITATIONS—Continued

	Page
Goldman v. U.S., 316 U.S. 129, 86 L. Ed 1322	24
Goldstein v. U.S., 318 U.S. 114, 62 S. Ct. 1000, 86 L. Ed 1312 (N.Y. 1942)	20, 21, 28
Houston, E & W T.R. Co. v. U.S., 234 U.S. 342, 58 L. Ed 1341, 34 S. Ct. 833	24
Hubin v. State, 180 Md. 279, 23 A. 2d 706, cert. denied, Neal v. State of Maryland 316 U.S. 680, 62 S. Ct. 1107, 86 L. Ed 1753	28
Montalbano v. State, 116 Tex. Crim. Rep. 242, 34 S.W. 2d 1100 (1930)	22
Mardone v. U.S., 302 U.S. 379, 58 S. Ct. 275 (1937)	21, 23
Mardone v. U.S., 308 U.S. 338, 84 L.Ed 307	24
People v. Channell, 236 P. 2d 654, (Cal. App. 1951)	27
People v. Kelly, 22 Cal. 2d 169, 122 P. 2d 1, cert. denied, 320 U.S. 715, 64 S. Ct. 264 88 L. Ed 1420, rehearing denied, 321 U.S. 802, 64 S. Ct. 527, 88 L.Ed 1089	28
Rowan v. State, 175 Md. 547, 3 A. 2d 753	28
Southeastern Underwriter Assn. v. South Car- olina, 322 U.S. 533, 58 S. Ct. 1162, 88 L. Ed 1440	28

CITATIONS—Continued

	Page
Southern Pac. R.R. Co. v. Arizona, 325 U.S. 761, 65 S. Ct. 1515, 89 L.Ed 1915	28
State v. Pavelich, 153 Wash. 379, 279 P. 1102	20
Testa v. Katt, 330 U.S. 386, 91 L.Ed 967	22, 23, 26, 27
U. S. v. Polakoff, 112 Fed. 2d 88 (CCA 2d), cert. denied, 311 U.S. 653, 85 L. Ed. 418	24
Weiss v. U.S., 308 U.S. 321, 84 L.Ed 298	24, 25
Wolf v. Colorado, 338 U.S. 25, 93 L.Ed 1782	27

statutes:

Federal Communications Act:

48 Stat 1100, 47 U.S.C.A. 501 (Supp. 1951)	20
48 Stat 1103, 47 U.S.C.A. 605 (Supp. 1951)	15, 18, 21

Federal Bankruptcy Act:

30 Stat 548 (1898) Amended 52 Stat 847 (1938), 11 U.S.C.A. 25a(10) (1940)	26
--	----

Vernon's Code of Criminal Procedure:

Article 727(a)	22
----------------------	----

Miscellaneous:

Warren, Federal Criminal Laws and the State Courts, 38 Harvard L. Rev. 545	27
Words and Phrases, Vol. 2, p. 392, Vol. 40, p. 524	20

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

THOMAS SCHWARTZ, *Petitioner*

V.

STATE OF TEXAS, *Respondent*

**Petition for a Writ of Certiorari to the Court of
Criminal Appeals of the State of Texas**

Thomas Schwartz, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered on the 14th day of November, 1951, and in which petitioner's Motion For Rehearing was denied on the 31st day of January, 1952.

OPINIONS BELOW

No. 25,458

Thomas Schwartz, Appellant,

vs.

The State of Texas, Appellee.

Appeal from Dallas County

The offense is that of being an accomplice to the crime of robbery; the punishment, ninety-nine years.

One Jarrett and one Bennett, both escapees from an Ohio jail, came to Dallas a few days before February 17, 1950. On that day, after preparations which will be hereinafter shown, they went to the home of Dr. Shortal in that city, gained admittance by the use of firearms, tied up the servants and waited for Mrs. Shortal's return. When she did return, at pistol point she was forced to surrender her diamond rings and then locked in a closet. After leaving the Shortal residence, Jarrett and Bennett went to the pawnshop of appellant and left the diamond rings with him. They received a small amount of money, in comparison to the value of the jewelry, and expected appellant to dispose of the jewelry and compensate them further. Of these facts there seems to have been no controversy.

At the trial of appellant, Jarrett and Bennett both testified for the State and, in addition to the above, told of having entered into a conspiracy with appellant to commit a series of robberies, of having received arms and information as to whom to rob from appellant, and of having in accordance with this conspiracy performed the Shortal robbery and carried to him the fruits thereof for disposal and a division of the proceeds among the three of them.

Appellant denied the conspiracy and claimed that he received the diamonds as an innocent purchaser for value.

We shall attempt to discuss the questions presented by appellant in the order advanced.

Our attention is first directed to appellant's claim that there is no evidence other than the testimony of the two accomplice witnesses which tends to connect him with being an accomplice to the commission of the offense, and that their testimony is not sufficiently corroborated.

Jarrett told of purchasing a pistol from appellant at his pawnshop and returning it the next day because it would not fire. On this occasion, appellant remarked to Jarrett, "If you had a partner to work with, you might be able to make a good score." Thereupon, Jarrett introduced Bennett to appellant; and the three of them worked out a division of any spoils they might acquire by virtue of robberies contemplated, wherein appellant was to furnish the name of the party to be robbed, Jarrett and Bennett were to commit the robbery and bring the fruits thereof to appellant for disposal. An equal division of the proceeds was agreed upon.

At this juncture, appellant sent his assistant, a colored boy named Davis, up to the third floor to test the new gun being furnished Jarrett and which was later used in the Shortal robbery. Davis testified in corroboration as to this fact and, further, that at the instance of appellant following the Shortal robbery, he delivered fifty dollars

to Jarrett in person and sent a second fifty dollars under a fictitious name to Houston. This was shown to have been received by Bennett. Davis further testified that he saw Jarrett and Bennett in the pawnshop in company with appellant on another occasion prior to the Shortal robbery.

Jarrett testified that on the morning of the robbery, and in preparation therefor, appellant in the presence of Jarrett and Bennett called the Shortal Clinic to ascertain whether Dr. Shortal had left home. This was done so that they would not encounter Dr. Shortal when they went to rob his home.

Miss Kate Graham, the receptionist at Dr. Shortal's Clinic, corroborated Jarrett as to such a telephone call, as will be seen in our discussion of Bill of Exception No. 4:

In addition to the above, we find two telling portions of evidence tending to show appellant's connection with the fruits of the robbery after the same had been committed.

The witness Graham testified that some time following the robbery she received an anonymous telephone call at the Clinic making inquiry as to a reward for the missing diamonds. Immediately thereafter, at the suggestion of the police, she called appellant at his place of business and positively identified his voice as being the one that had made the reward inquiry.

We further find the testimony of the witness DeWitt, an insurance adjuster from whom the appellant made sur-

reptitious inquiry concerning the reward for the return of the Shortal diamonds following the robbery and their delivery to him for disposal by Jarrett and Bennett.

We feel that the recorded telephone conversations between Jarrett and appellant hereinafter discussed under Bill of Exception No. 1 corroborate Jarrett's and Bennett's version of the transaction and disprove appellant's defense.

Bill of Exception No. 1 complains of the playing before the jury of such records of conversations between the witness Jarrett and the appellant. These records were made in the Sheriff's office at the suggestion of the District Attorney for the purpose of securing evidence against appellant. Jarrett was then a prisoner and cooperated with the officers in making out the State's case. The medium of their communication was the telephone, Jarrett being in the Sheriff's office and appellant being at his pawnshop.

Illustrative thereof is an answer made by Schwartz to questions by Jarrett concerning securing the services of a lawyer and how much information the police had about the guns used in the robbery, when he said, "• • • you sit in the boat and we will get along better. There's no use of ten people drowning when one can drown and one can help the other."

Appellant leveled nine objections to the evidence, of which we will discuss those urged in his brief.

Appellant sought to invoke the terms of Section 605 of Title 47, U. S. Code Annotated; Telegraphs, Telephones and Radiotelegraphs, commonly referred to as the Federal Communications Act, by claiming that he did not consent to the making of the recordings or to their introduction in evidence and cites us opinions in several cases arising in Federal Courts.

Without holding this evidence to have been obtained in violation of Section 605, we address ourselves rather to the question of the applicability of a Federal procedural statute to a trial in a State Court.

Prior to 1929, the statute, now Article 727a, Vernon's Code of Criminal Procedure, read,

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the *United States of America*, shall be admitted in evidence against the accused on the trial of any criminal case."

It now reads,

o "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the *Constitution of the United States of America*, shall be admitted in evidence against the accused on the trial of any criminal case."

In 1930, we said in *Montalbano v. State*, 34 S. W. (2d) 1100:

"* * * Article 727a, C. C. P., was amended so as to no longer require rejection of evidence obtained in violation of laws of the United States. There is no claim that the evidence was obtained in violation of any law of this State."

This evidence was not obtained in violation of the State or Federal Constitution or the statutes of Texas and was here admissible as against this objection.

Appellant next complains that the phonographic records were secondary evidence and that Jarrett himself was the source of the best evidence. We are cited no authorities. It appears to us that the complaint is not well taken.

Bill of Exception No. 4 complains that the witness Graham was permitted to testify as to having received an anonymous telephone call.

This testimony was in corroboration of the accomplice Jarrett, who had, prior to the receipt of the Graham evidence, testified that he was present when appellant called her on the telephone and told these details of the conversation, which she corroborated:

1. That the call was made in the morning of the day of the robbery.
2. That it was made to Dr. Shortal's Clinic.
3. That the person calling inquired about the whereabouts of Dr. Shortal and told of an alleged automobile accident between Mrs. Shortal's car and that of the caller.

4. The refusal of the caller to give his telephone number.

From this we conclude that the trial court was possessed of sufficient facts to cause him to believe that the two witnesses were talking about the same conversation and that the witness Graham was corroborating the witness Jarrett. Though not conclusive, this was certainly persuasive of the fact that Jarrett spoke the truth.

In 22 *Corpus Juris Secundum*, Section 644, page 984, we find the following:

"Telephone Conversations

"The completeness of the identification goes to the weight of the evidence, and not to its admissibility. Whether evidence of a telephone conversation is admissible rests in the discretion of the trial court.

"It has been said the rule does not define any one method or way of making a telephone conversation admissible; and there is no rule of evidence which requires that every witness to a conversation shall himself identify the participants in it, identification by others being considered sufficient. Although it has been said that ordinarily the witness must recognize the declarant's voice, it has been held that it is not imperatively necessary that the voice of the person talking be recognized by the other party to the conversation. The requisite identity may be established - - - by a third person listening to such conversation."

Bill of Exception No. 6 complains of two separate and distinct rulings of the Court:

1. Permitting the witness Bennett to testify about a certain pistol which he received from appellant.
2. The failure of the Court to grant appellant's requested charge concerning such testimony.

So framed, the bill complains of two matters, is therefore multifarious and presents nothing for review.

Appellant, in his Bill of Exception No. 5, seeks to raise a question that, by proving the method of division agreed upon among the thieves, the State proved another extraneous and substantive crime; to wit, conspiracy to commit a crime. We do not think the objections made at the time raised the question. However, we go further and say that such a holding would preclude the State from making out its case involving an accomplice as in the case at bar, because in so doing another offense would have been shown.

The witness Jarrett, in recounting the general working agreement made between the thieves prior to any discussion of the Shortal robbery, was asked, "At that time did you make any agreement between you and Bennett and Schwartz—make any agreements as to the distribution of properties taken in robbery?" His answer was, "Yes, we did. After we discussed the fine points and got down to splitting up of any loot on any of the robberies, he said, 'You go along with me and I will go along with you fellows, and we will split one-third ($\frac{1}{3}$) on all robberies—'."

When the question of the Shortal robbery was later raised, it was unnecessary for them to have a separate arrangement for the division of the spoils thereof, because this understanding had already been reached. An accurate recounting of the facts made this particular type of proof necessary.

The bill does not reflect that the jury heard any further mention of extraneous offenses other than that the plural "robberies" was used, as shown above. It appears to us that the careful trial judge limited the State's proof in this respect. The agreement entered into, though it embraced other crimes, was legitimate proof.

We do not feel that the bill reflects error.

Bill of Exception No. 3 complains that appellant was not permitted to recount a conversation he had with one Fink, who was not offered as a witness, in order to more fully make explanation of his recent possession of stolen property. The Court's qualification shows conclusively that appellant's agreement with Fink concerning the disposition of the diamonds had been fully covered in other portions of the testimony of the witness. We find nothing material in the excluded hearsay testimony not covered by that actually admitted in evidence.

Bill of Exception No. 2 contends that appellant was deprived of the opportunity to prove that his assistant tested all firearms by shooting them out of the window before a sale, or "lease" in the terminology of the pawnshop, was

consummated. An examination of the statement of facts shows that such evidence was actually adduced from the same witness when he was permitted to testify, "My purpose in going up there was to try the gun out to see if it would shoot all right; we do that whenever we 'lease' them." Hence the bill shows no error.

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, Judge

(Delivered November 14, 1951)

No. 25,458

Thomas Schwartz, Appellant,

vs.

The State of Texas, Appellee.

Appeal from Dallas County

OPINION ON MOTION FOR REHEARING

Appellant has filed two lengthy briefs in this court asking for a rehearing herein and for a reversal of this cause, all of which are but a reiteration of his original brief and argument with the exception of one claimed newly discovered point which was not offered in the first hearing in this matter.

We adhere to our views as expressed in the original opinion herein and will attempt to write briefly on the

new proposition which is raised, as follows: It is claimed that appellant, who was charged herein as an accomplice to robbery, under the facts, should have been charged as a principal rather than as an accomplice.

We are of the opinion that the facts, as presented here, to a certain extent, would bear out appellant's contention relative to his principalship except for the fact that there seem to be lacking cogent elements of a principalship, as follows: (1) the actual presence of the accused on the scene of the robbery at the time of the commission of the offense, and (2) the actual performance of an act by the appellant relative to such conspiracy at the time of the commission of such robbery. Herein, it is not shown that he was present, or kept watch, or that he did any act in furtherance of the robbery at the time of its commission so as to make him a principal therein. As we see it, the question as to the constructive presence of the appellant is not in the case.

Article 69 of the Penal Code reads as follows:

"Any person who advises or agrees to the commission of an offense and *who is present* when the same is committed is a principal whether he aid or not in the illegal act." (Italics supplied)

Article 70 of the Penal Code reads as follows:

"An accomplice is one *who is not present* at the commission of an offense, but who, before the act is

done, advises, commands or encourages another to commit the offense; or

"Who prepares arms or aid of any kind, prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same."
(Italics supplied)

Under the facts of this case, we find appellant at the time of the commission of the offense busily engaged in his place of business and daily avocation where he usually stayed. Appellant seems to have been doing absolutely nothing in furtherance thereof at the time of the commission of this offense, and was surprised by the rapidity with which the two thieves had executed that which he had previously commanded and encouraged them to do in the commission of such offense.

The charge here alleged is that the appellant, though not present at the time of the commission of the offense, had prior thereto advised, commanded and encouraged others to commit it. The proof established the charge, and also established that in accordance with the conspiracy agreement, the appellant received the fruits of the crime and had control over their disposition, except that the co-conspirators were to share in the fruits of the sale after the disposition of the stolen property; and the cited case of *Johnson v. State*, 206 S.W. (2d) 605, holds that in such event the accused was an accomplice rather than a principal.

Believing that appellant was correctly charged and proven as an accomplice, the motion for a rehearing will be overruled.

Graves, Presiding Judge.

(Delivered January 30, 1951)

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 14th day of November, 1951 to which petitioner filed a Motion For Rehearing, which motion was overruled on the 31st day of January, 1952. The jurisdiction of this Court is invoked under 28 U.S. Code Annotated Section 1257(3). Defendant objected to the admission of certain phonograph records obtained in violation of Section 605, Title 47, U.S. Code Annotated, at the time of trial before the Criminal District Court No. 2 of Dallas County, Texas, the Honorable Henry King, District Judge, presiding, which objection was overruled and exception thereto duly noted. (R. p. —). The objection was renewed in Defendant's First Amended Motion for a New Trial, (R. p. —), which motion was overruled, and judgment was entered (R. p. —), whereupon defendant in open court excepted to such judgment and gave notice of appeal to the Court of Criminal Appeals of the State of Texas, at Austin, Texas. (R. p. —). Defendant further raised the objection in his Bill of Exceptions No. 1 to which no qualification was appended by the said

Henry King, District Judge (R. p. —). Defendant cited as error the failure to exclude the evidence obtained in violation of Section 605, but the Court of Criminal Appeals of the State of Texas in its opinion did not pass on the question of whether or not a violation had occurred, but characterized the statute as a procedural one, hence not applicable (R. p. —). Defendant in his Motion For Rehearing again urged the court to correct the error of denying petitioner his right to have the phonograph records excluded as having been obtained in violation of Section 605 (R. p. —), but the court in its opinion overruling the Motion For Rehearing stated that they adhered to their views expressed in the original opinion (R. p.—). Whereupon petitioner obtained a stay of execution of 90 days pending the perfection of his application for a Writ of Certiorari in this Court.

QUESTION PRESENTED

Whether the Court of Criminal Appeals of the State of Texas erred in denying the supremacy of the Federal Communications Act, 48 Stat. 1103, 47 U.S. Code Annotated 605 (Supp. 1951) in violation of Article VI of the Constitution of the United States, thus denying petitioner a right claimed under a statute of the United States.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, infra, pp. 31-2.

STATEMENT OF THE CASE

On the 25th of March, 1950, your petitioner, Thomas Schwartz, was indicted by the Grand Jury of Dallas County, Texas, charged with being an accomplice to armed robbery. Specifically the indictment charged "that on February 17, 1950; one William Trent Jarrett robbed Mrs. Minnie Shortal of valuable jewelry, and that prior to the commission of said offense by the said William Trent Jarrett, the said defendant Thomas Schwartz did unlawfully and wilfully advise, command and encourage the said William Trent Jarrett to commit said offense, the said Thomas Schwartz not being present at the commission of said offense by the said William Trent Jarrett."

On the third trial of this case before a jury in the Criminal District Court of Dallas County, Texas, your petitioner was found guilty and the jury assessed a penalty of ninety-nine (99) years in the penitentiary. Upon appeal the case was affirmed by the Court of Criminal Appeals of Texas, to which Court this Petition for Writ of Certiorari is directed.

William Trent Jarrett and a man by the name of Lester Bennett were indicted for the actual robbery of Mrs. Minnie Shortal, a resident of Dallas County, Texas. After the affirmance of petitioner Schwartz' case, Bennett pleaded guilty before the Court and the Court sentenced him to serve eight years in the penitentiary. Jarrett was

returned to the State of Kentucky, where he was already under a life sentence before he escaped and came to Texas, no formal disposition having been made of the robbery case against him in Dallas, Texas.

The evidence reveals that on the afternoon of February 17, 1950, the robbers Jarrett and Bennett, armed with pistols, entered the fashionable home of the prosecutrix, Mrs. Minnie Shortal, and at pistol-point robbed her of certain diamond rings and jewelry. At the time of the perpetration of the robbery, they locked her in a closet and tied up with cords the butler and maid servants.

The robbers Bennett and Jarrett then took the jewelry in question to the pawn shop of your petitioner Thomas Schwartz to pawn or dispose of same. Your petitioner testified that he agreed to purchase the jewelry after same had been appraised by a competent appraiser. He denied he had any part in planning the robbery.

The defendants Jarrett and Bennett, the actual robbers, turned State's evidence and testified for the State, Jarrett being the State's star witness. Jarrett testified it was Schwartz who turned him over to the police.

Schwartz returned all of the jewelry to Mrs. Shortal through the witness Fritz, Captain of Detectives.

Under the law of the State of Texas the testimony of an accomplice must be corroborated and the principal corroboration relied upon by the State was an intercepted

telephonic conversation which was recorded, the conversation being between your petitioner Schwartz and the robber Jarrett.

The testimony reveals that while Jarrett was confined in jail, that he was taken by the District Attorney and his assistants into a room in the Sheriff's office, where a recording machine was set up. Under the direction of the District Attorney's staff, Jarrett telephoned to Schwartz at his pawn shop, and some fifteen or twenty conversations were intercepted and recorded without the knowledge or consent of your petitioner. Six of these recorded conversations were played to the jury on the phonographic record. It is the contention of your petitioner that without this testimony a conviction could not be had, and that "wire tapping" evidence brought about your petitioner's conviction.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Criminal Appeals of the State of Texas erred:

1) In holding that Section 605, Title 47, U.S. Code Annotated, known as the Federal Communications Act, is a federal procedural statute and not binding on all states and judges as the supreme law of the land.

2) In denying to petitioner his rights granted him by Section 605, Title 47, U. S. Code Annotated, against divulgence of intercepted communications without his consent

and thereby denying the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States.

REASONS FOR GRANTING THIS WRIT

1. The Court of Criminal Appeals makes it clear in its opinion that its decision affirming the conviction rests primarily upon the recorded telephone conversations between petitioner and Jarrett when it says:

"We feel that the recorded telephone conversations between Jarrett and appellant hereinafter discussed under Bill of Exceptions No. 1 corroborate Jarrett's and Bennett's version of the transaction and disprove appellant's defense." (R. p. —).

The court recognizes petitioner's timely objections to the evidence in claiming his rights granted under Section 605, but says:

"Without holding this evidence to have been obtained in violation of Section 605, we address ourselves rather to the question of the applicability of a Federal procedural statute to a trial in a State Court." (R. p. —).

The Court of Criminal Appeals of the State of Texas erred in characterizing the Federal Communications Act as a procedural statute. The source books define a substantive law as one that conveys substantive rights to an individual, a procedural law as one that directs the method of procedure to protect the substantive rights given

the individual. Words and Phrases, Vol. 2, p. 392; Vol. 40, p. 524.

Rules of evidence constitute substantive law and cannot be governed by rules of court. *State v. Pavelich*, 279 P. 1102, 153 Wash. 379.

That the right created by the statute is a personal right is not open to question. This Court held in *Goldstein v. U. S.*, 318 U.S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312 (NY 1942) that Section 605 is intended to protect only the sender and he alone can invoke it. Moreover, it was held in that case that intercepted communications are admissible against one not a party to the communications. Hence, Congress gave a substantive right to individuals to be free from interference in their use of communications facilities. The statute does not merely prescribe procedure, it creates a right in an individual which only he can claim.

In order to further protect the right created by the Act, Congress established a general penalty for the violation of such right. 48 Stat. 1100, 47 U.S. Code Annotated 501. It is clear that a statute which creates personal rights in an individual and makes the violation of such right a felony, can in no sense be characterized as a procedural statute.

The harm in such erroneous characterization as made by the Court of Criminal Appeals of the State of Texas is that it nullifies the express intent of Congress, as con-

strued by this Court, as well as ignores the mandate of Article VI of the Constitution of the United States. If the Act is a procedural one, then it would not be binding upon the courts and judges of the State of Texas. Likewise the court avoids the necessity of expressly denying the supremacy of an Act of Congress. If the Federal Communications Act had expressly created a cause of action for the violation of Section 605, then "(T)he Act creating the cause of action, being enacted pursuant to the United States Constitution, is the supreme law of the land, and binding on state courts and judges". *Bowles v. Angelo*, 188 SW 2d 691, 694 (Tex. Civ. App. 1945). The court in that case cited *Claflin v. Houseman*, 93 U.S. 130, 136, 23 L.Ed 833, quoting therefrom; "Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction."

It is clear therefore that if Section 605 created a substantive right, the Texas Courts would be bound to recognize such right as the supreme law of the land.

This Court held in *Nardone v. U. S.*, 302 U.S. 379, 58 S. Ct. 275 (1937) that the evidence obtained in violation of the right created by Section 605 must be excluded. Since the statute creates a right in the sender and he alone can claim it, *Goldstein v. U. S.*, 318 U.S. 114, 62 S. Ct. 1000

(1942) then neither such right nor the statute creating it can be characterized as procedural. Hence the refusal of the Court of Criminal Appeals of the State of Texas to reverse the conviction and exclude the recordings because the court finds that the statute was a procedural one only, is clearly error and should be reversed.

The Court of Criminal Appeals further justified its decision by reference to Article 727a, Vernon's Code of Criminal Procedure. Prior to the amendment of this statute, it operated to exclude evidence obtained in violation of a statute of the United States of America, in addition to other exclusions. In 1929 the statute was amended to permit the use of evidence obtained in violation of a federal statute. *Montalbano v. State*, 116 Tex. Crim. Rep. 242, 34 SW 2d 1100 (Tex. Crim. App. 1930). This statute precedes the adoption of Section 605 and cannot control where Congress has legislated in an area in which it may constitutionally do so. A state does not have the power to invalidate a right created by Congress. Under the *Angelo* case, 188 S. W. 2d 691 (Tex. Civ. App. 1945) the courts of Texas are committed to the rule of the *Claflin* case, 93 U.S. 130, 23 L.Ed. 833, recognizing the supremacy of an Act of Congress. Moreover, the case of *Testa v. Katt*, 330 U.S. 386, 91 L. Ed. 967, reaffirmed and strengthened the rule of the *Claflin* case. It follows therefore that Congress having created a right in individuals, the law is binding alike upon all states, courts and the people.

2. The decision of the Court of Criminal Appeals of the State of Texas is erroneous because of the failure to recognize the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States. Even if there were a fixed policy in Texas contrary to the policy expressed by Congress in Section 605, it would not alter the case.

"For the policy of the federal Act is the prevailing policy in every state. Thus, in a case which relied chiefly upon the *Claffin* and *Mondou* precedents, this Court stated that a state cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers'". *Testa v. Katt*, 330 US 386, 393, 91 L. ed. 967, 972.

It would appear, therefore, to be settled by this Court that valid laws of the United States are the Supreme Law of the land, and the judges in every state and all courts are bound thereby.

This Court in *Nardone v. U. S.*, 302 U.S. 379, 58 S. Ct. 275 (1937) held that the words of Section 605 "forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person'. To recite the contents of the message in testimony before a court is to divulge its message." Neither the language of this decision or the language of the statute limit in any way a tribunal in

which this prohibition is to operate. It lays down a general rule which in the absence of limiting words must be accepted as a public policy. In a subsequent hearing of this case, *Nardone v. U. S.*, 308 U.S. 338, 340, 84 L.Ed. 307, 311, this Court, per Mr. Justice Frankfurter, said in reference to the opinion in the first *Nardone* case:

"That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, 'it outlawed because 'inconsistent with the ethical standards and destructive of personal liberty'. 302 US 379, 384, 82 L. ed. 314, 317, 58 S. Ct. 275."

This Court by unanimous decision held in *Weiss v. U. S.*, 308 U.S. 321, 84 L.Ed. 298, that the exclusion of evidence obtained in violation of Section 605 is not limited to interstate and foreign commerce, that Congress has the power, when necessary for the protection of interstate commerce to regulate intrastate transactions. *Shreveport Case (Houston, E & W T. R. Co. v. U. S.)* 234 U.S. 342, 58 L.Ed. 1341, 34 S. Ct. 833.

That there was an interception in the case at bar is beyond doubt. The circumstances here are virtually identical with those in *U. S. v. Polakoff et al*, 112 Fed. 2d 88, (CCA 2d), cert. denied 311 U.S. 653, 85 L.Ed. 418, and is clearly distinguishable from *Goldman v. U. S.*, 316 U.S. 129, 86 L.Ed. 1322. Moreover, it is important to note

that in the case at bar, the state did not merely offer testimony concerning the conversations, but the recordings themselves were offered in evidence and admitted in evidence by the trial judge, not by way of impeachment, but as direct evidence.

The decision of this Court in the Weiss case, *supra*, clearly shows that Congress did not limit the application of Section 605 to the Federal courts, nor lay down a policy applicable only to the Federal courts. Nowhere does the statute make any reference to courts. The Nardone cases together with the Weiss case make it abundantly clear that the statute was the promulgation of a broad public policy in a field in which Congress was competent to legislate. As the Court has said, any other holding would be denying "a decent respect for the policy of Congress". The language of the statute commands that "no person not being authorized by the sender shall intercept any communication and divulge or publish . . . such intercepted communication to any person". There are no words of limitation in this clause, such as exists with reference to the other clauses in the section. The statute does not lay down a rule of procedure for any courts; it lays down a rule of substantive law. Even if it were a rule of procedure, Congress would nevertheless have the power to prescribe a procedural rule which would become the supreme law of the land. The federal law has reached into procedure in other instances. It has been held that internal revenue agents may not be compelled by State courts

to testify in a manner prohibited by treasury department regulations. *Boske v. Comingore*, 177 U.S. 459, 20 S. Ct. 701 (1900). Likewise a provision of the Federal Bankruptcy Act, 30 Stat. 548 (1898) amended 52 Stat. 847 (1938), 11 U. S. Code Annotated 25 a(10) (1940), provides that "no testimony given by him (a bankrupt) shall be offered in evidence against him in any criminal proceeding." Irrespective of whether it purports to govern procedure or not, and nothing in the statute lends support to the theory that it is a procedural statute, Section 605 created a right which became the supreme law of the land, binding on all judges in all states "any Thing in the Constitution or Laws of any State to the contrary notwithstanding". The case of *Testa v. Katt*, supra, would appear to be conclusive on this point. Clearly, if the words "divulge to any person" comprehends testimony in a court, and bars such testimony in a Federal court, the language likewise bars such testimony in a State court. This Court, in the Weiss case, refused to engraft by construction restrictions and limitations which do not appear in the statute. The Court found that the changed wording in the second and fourth clauses had significance and were not inadvertent. There is nothing in the language of the statute to show that Congress intended to limit the prohibition to Federal courts. In fact, there is no holding that there exists such a limitation as to any Court. If the policy is to be effective and the public policy upheld, the Court cannot engraft restrictions and limita-

tions which do not appear in the statute. Should the Court refuse to so hold, the protection afforded by the statute and the underlying policy which this Court has documented in great detail, against invasion of privacy and protection of commerce, would be narrowed to the vanishing point, for the bulk of criminal prosecutions occur in the state courts. In addition, Congress could grant concurrent jurisdiction to state courts to prosecute federal crimes in state courts, thereby nullifying completely the effect of Section 605. In the early days of the republic, Congress did grant concurrent jurisdiction to the state courts to enforce federal statutes, and may constitutionally do so again. Warren, *Federal Criminal Laws and the State Courts*, 38 *Harvard L. Rev.* 545. Moreover, in most federal crimes, there is likewise a state crime, so that federal authorities could defer to state prosecuting authorities, and federal officers could testify in state courts as to the contents of any intercepted communications.

Some of the recent cases confuse the rule of *Wolf v. Colorado*, 338 U.S. 25, 93 L.Ed. 1782, with the rule of the *Testa* case. *People v. Channell*, 236 P. 2d., 654, (Cal. App. 1951) We are not concerned here with the rule dealing with admissibility of evidence illegally obtained or the state rules pertaining thereto. It is contended that the Federal Communications Act, being a valid exercise of Congressional authority in an area in which Congress is

authorized to legislate, is an expression of Congressional policy which supersedes local rules and must be given effect as the supreme law of the land pursuant to Article 6 of the Constitution of the United States. No state may decline to enforce the statute because of any conflict with local law or policy. *Sou. Pac. R.R. v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L.Ed. 1915; *Southeastern Underwriters Asso. v. South Carolina*, 322 U.S. 533, 58 S.Ct. 1162, 88 L. Ed. 1440.

There have been cases which presented similar questions. In *Rowan v. State*, 175 Md. 547, 3 A. 2d. 753, the decision antedated this Court's decision in the Weiss case and cannot be deemed controlling. In any event, a state court is not competent to pass on the validity of a Federal Statute. In two instances, *People v. Kelly*, 22 Cal. 2d 169, 122 P. 2d. 1, cert. denied, 320 U.S. 715, 64 S.Ct. 264, 88 L.Ed. 1420, rehearing denied, 321 U.S. 802, 64 S.Ct. 527, 88 L.Ed. 1089; *Hubin v. State*, 180 Md. 279, 23 A. 2d. 706, cert. denied, *Neal v. State of Maryland*, 316 U.S. 680, 62 S.Ct. 1107, 86 L.Ed. 1753, the issue presented to the Court involved situations where the defendants were not the senders of the communications and therefore came within the rule of the Goldstein case.

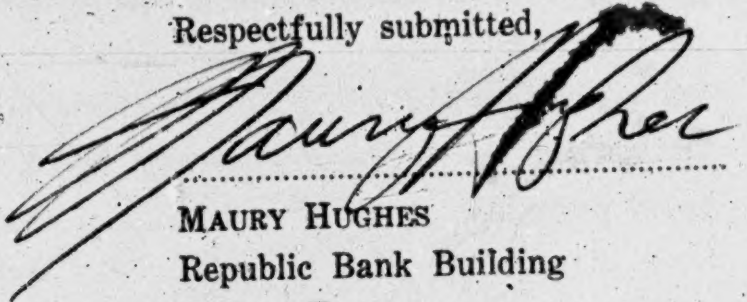
This Court has not heretofore had the opportunity to pass on the question presented in the case at bar, yet the issue presented here is one which only this Court can

resolve. There is a marked increase in the invasions of privacy and encroachments on individual liberties. Congress promulgated a public policy for the protection of interstate commerce and there has been no change in the philosophy which gave rise to the public policy expressed by Section 605, and no expression by Congress that the policy has been altered. There have been repeated attacks against the policy and innumerable instances where the penal provisions created for violation of Section 605 have been disregarded with impunity. The rule of *Erie v. Thompkins*, 302 U.S. 671, 58 S.Ct. 50, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, would require the same policy to govern in every state, otherwise in a diversity case, the applicable rule would vary from state to state since admissibility of evidence being substantive, the Court would be required to follow the local rule. It is clear that Congress intended no such result, yet unless the Federal Communications Act is held to be applicable as the supreme law of the land, the protection afforded interstate commerce would vary from state to state. It is therefore of the greatest importance that it be resolved by this Court whether the states are bound by Section 605 of the Federal Communications Act or whether the statute is to be reduced to mere verbiage.

CONCLUSIONS

For the foregoing reasons, this Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

Respectfully submitted,



MAURY HUGHES

Republic Bank Building
Dallas, Texas

REUBEN M. GINSBERG

Texas Bank Building
Dallas, Texas

Counsel for Petitioner

APPENDIX

A. Statutes

48 Stat. 1103, 47 USCA 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person, other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to a proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a Court of Competent Jurisdiction, or on demand of other lawful authority;

And no person not being authorized by the sender shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;

And no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

And no person having received such intercepted communications or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto:

PROVIDED, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

48 Stat. 1100. 47 USCA 501:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than \$10,000 or by imprisonment for a term not more than two years, or both.

Article 727(a), Vernon's Code of Criminal Procedure:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or Laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court,
FILED
MAY 26 1952
CHARLES CLARKE CROFT
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1951

41 ———
No. 738, MISCELLANEOUS

THOMAS SCHWARTZ,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

PRICE DANIEL
Attorney General of Texas

CALVIN B. GARWOOD, JR.
Assistant Attorney General

*Attorneys for Respondent,
The State of Texas.*

INDEX

	Page
Preliminary Statement.....	1
Statement of the Case.....	2
Point One.....	3
The admission of recordings of intercepted telephone conversations into the evidence of a trial in a State court involving a matter of State law is not a violation of the United States Constitution or the Federal Communications Act.	
Argument and Authorities.....	4
Conclusion.....	9
Appendix.....	11

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
Atchison T. & S. F. Ry. Co. v. Railroad Commission of California, 283 U.S. 380	8
Goldman v. United States, 316 U.S. 129	5
Harlem Check Cashing Corp. v. Bell, 68 N.E. 2d 854	7
Hubin v. State, 23 A. 2d 706 (cert. den. sub nom. Neal v. Maryland)	7
Montalbano v. State, 34 S.W. 2d 1100	6
Nardone v. United States, 302 U.S. 379	5
Neal v. Maryland, 316 U.S. 680	7
Olmstead v. United States, 277 U.S. 438	4, 5
People v. Channell, 236 P. 2d 654	7
People v. Kelley, 137 P. 2d 1	8
People v. Stemmer, 83 N.E. 2d 141, affd. Stemmer v. New York, 336 U.S. 963	7
Rowan v. State, 3 A. 2d 753	8
Savage v. Jones, 225 U.S. 501	8
State v. Mara, 78 A 2d 922	7
Scholl v. State, 235 S. W. 2d 639, cert. den. 342 U.S. 834	8
Schwartz v. State, 246 S. W. 2d 174	1
Townsend v. Yeomans, 301 U.S. 441	8
Weiss v. United States, 308 U.S. 321	5
Wolf v. Colorado, 338 U.S. 25	7

Statutes

Texas Code of Criminal Procedure (Vernon 1948) Art. 727a	6
United States Code Annotated Title 47, Section 605	11

IN THE
Supreme Court of the United States
OCTOBER TERM, 1951

No. 730, MISCELLANEOUS

THOMAS SCHWARTZ,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

PRELIMINARY STATEMENT

In Criminal District Court No. 2 of Dallas County, Texas, petitioner was convicted of the offense of being an accomplice to the crime of robbery. Upon appeal to the Court of Criminal Appeals of Texas, the conviction was affirmed and a motion for rehearing overruled.¹

Petitioner here assigns as error the admission into evidence of recordings of a number of telephone conversations to which he was a party. This evidence, it is said, corroborated the testimony of other witnesses and thus led to petitioner's conviction. It is

¹ *Schwartz v. State*, 246 S. W. 2d 174 (Tex. Crim. 1952).

urged that this was a violation of Section 605 of the Federal Communications Act, 47 U.S.C.A. 605, which forbids the divulgence of intercepted wire and radio communications without the consent of the sender.²

It is respectfully submitted that this case is not a proper one for review by certiorari in this Honorable Court. The uncontroverted facts of this case reveal that petitioner is guilty of the offense of which he was charged. He was given a fair trial in which he was extended every privilege to which he was entitled under both Federal and State law. In his petition for certiorari, petitioner raises as his federal question a legal point which has previously been decided against him upon a number of different occasions by this and other courts. Therefore, for the reasons to be stated below, it is respectfully submitted that his petition for certiorari should be denied.

STATEMENT OF THE CASE

The facts of this case as set forth in the opinion of the Court of Criminal Appeals are complete and correct but will be briefly summarized here for the convenience of the Court.

William Trent Jarrett and Lester Emmett Bennett forcibly gained admittance to the Dallas, Texas, home of Dr. W. W. Shortal. There they bound the servants, and when Mrs. Shortal returned to the home they forced her to surrender her diamond rings

² Section 605 of the Federal Communications Act is set forth in full in the Appendix, p. 11.

and then locked her in a closet. From the Shortal residence they went to petitioner's pawnshop and there left the rings for disposal by him.

At petitioner's trial, Jarrett and Bennett testified that they had entered into a conspiracy with petitioner, whereby they would commit a series of robberies, being furnished by petitioner with firearms and information as to whom to rob. Petitioner was to receive and dispose of the spoils, and then they would divide the proceeds. The Shortal robbery, they testified, was carried out in accordance with this scheme. Petitioner denied the conspiracy, claiming that he received the jewelry as an innocent purchaser for value.

The testimony of Jarrett and Bennett was corroborated by certain recorded telephone conversations between Jarrett and petitioner. The records were made by the Sheriff's department with the cooperation of Jarrett, who was then a prisoner. They were played for the jury in petitioner's trial, and it is this action which is challenged in the petition for certiorari.

Petitioner was found guilty as charged, and he was sentenced to ninety-nine years in the State penitentiary. The Texas Court of Criminal Appeals, the court of last resort for criminal matters in Texas, affirmed the conviction and overruled a motion for rehearing. Petition for certiorari was then filed in the Supreme Court of the United States.

POINT ONE

The admission of recordings of intercepted telephone conversations into the evidence of a trial in

a State court involving a matter of State law is not a violation of the United States Constitution or the Federal Communications Act.

ARGUMENT AND AUTHORITIES

At the outset it should be noted that the recorded telephone conversations in question were obtained without trespass upon petitioner's property. This being true, the instant case comes within the decision of this Court in *Olmstead v. United States*,³ wherein it was held that the admission of evidence obtained by means of tapping telephone wires into a criminal trial does not constitute an invasion of any rights extended to a defendant under the Constitution of the United States, provided there is no trespass involved. The Court added, however, that Congress has the authority to enact legislation to protect the secrecy of telephone conversations and to render such evidence inadmissible in the trial of a party to such an intercepted conversation. The following language of this Court, taken from a more recent decision, demonstrates that the rule of the *Olmstead* case remains in full force and effect today:

"The petitioners ask us, if we are unable to distinguish *Olmstead v. United States*, to overrule it. This we are unwilling to do. That case was the subject of prolonged consideration by this court. The views of the court, and of the dissenting justices, were expressed clearly and at length. To rehearse and reappraise the arguments pro and con, and the conflicting views exhibited in the opinions, would serve no good

³ 277 U.S. 438 (1928).

purpose. Nothing now can be profitably added to what was there said. It suffices to say that we adhere to the opinion there expressed.”

Thus it is clear that there is no constitutional right involved in this case. If petitioner has any right to be protected, it arises from a statute and not the Constitution.

Subsequent to the decision in the *Olmstead* case, Congress enacted the Federal Communications Act, of which Section 605 is important here. This section renders it illegal to reveal, without the consent of the sender, the contents of any intercepted telephone, wire or radio communication. The Supreme Court of the United States has construed the Act to prohibit Federal officers and other persons from testifying in Federal criminal trials as to interstate messages which were overheard by tapping telephone wires.⁵ More recently the ban has been extended to include intrastate, as well as interstate, messages.⁶

Petitioner urges that *Weiss v. United States*, *supra*, is authority for the proposition that evidence obtained by intercepting telephone conversations is inadmissible in State as well as Federal Courts. We readily concede that the decision extends the application of the Federal Communications Act to intrastate messages. But it does not follow that the Act forbids the admission of such evidence into a trial in a State court, in which matters of State law only are involved. In the *Weiss* case, this Court reviewed

⁴ *Goldman v. United States*, 316 U.S. 129, 135, 136 (1942).

⁵ *Nardone v. United States*, 302 U.S. 379 (1937).

⁶ *Weiss v. United States*, 308 U.S. 321 (1939).

the action of a *Federal* District Court. There was presented no question concerning the admissibility of any evidence in a State trial. The sole question before this Court was whether a Federal trial court properly received evidence obtained by tapping telephone wires if the communications were intrastate. Therefore, it is submitted that the decision is inapplicable here.

Article 727a, *Texas Code of Criminal Procedure* (Vernon 1948), reads as follows:

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

This statute formerly provided that evidence obtained in violation of the Constitution or laws of either the United States or Texas was inadmissible in a Texas criminal trial.⁷ It was amended, however, so that now the only Federal restrictions upon the admissibility of evidence in Texas criminal trials are to be found in the Constitution of the United States. Thus, the Texas Courts are no longer bound by Federal statutes in this respect.⁸ There is no

⁷ Article 727a, before amendment to its present form, read as follows:

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

⁸ *Montalbano v. State*, 116 Tex. Crim. 242, 34 S. W. 2d 1100 (1931).

Texas law which forbids the admission of evidence of the kind complained of here.

A recent decision of this Court has upheld the right of State courts to accept or reject evidence according to the laws of the individual state.⁹ Thus, the mere fact that certain evidence is inadmissible in a Federal trial does not render the same evidence inadmissible in a State trial. In *Wolf v. Colorado*, *supra*, the Court stated the issue there in terms which precisely summarize the question to be resolved in this proceeding, as follows:

"The precise question for consideration is this: Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States . . . ?"

The decision in the case answered the question in the negative.

It has been squarely held in a number of different decisions that Section 605 of the Federal Communications Act does not prohibit the admission of evidence obtained by tapped telephone lines into a trial in a State court.¹⁰ This Court has approved most of

⁹ *Wolf v. Colorado*, 338 U.S. 25 (1949). See also *State v. Mara*, 78 A. 2d 922 (N.H. Sup. 1951).

¹⁰ *People v. Stemmer*, 83 N.E. 2d 141, *affd.* *Stemmer v. New York*, 336 U.S. 963 (1949); *Hubin v. State*, 23 A. 2d 706, *cert. den. sub nom. Neal v. Maryland*, 316 U.S. 680 (1942); *People v. Channell*, 236 P. 2d 654 (Cal. 1951); *Harlem Check Cashing Corp. v. Bell*, 68 N.E. 2d 854 (N.Y.

these decisions, either by denial of certiorari or by affirmance. Less than a year ago, the same contention was presented to this Court in a case which arose in Texas, and certiorari was denied.¹¹

Under the authority of its inherent police power, the State of Texas has undertaken to regulate extensively its criminal prosecutions and the admission of evidence therein. A Federal statute must be presumed to affect only Federal jurisdiction and not to supersede a State's exercise of police power unless there is a readily apparent manifestation of Congressional intent that it should operate thus.¹² In the absence of a clear and unequivocal expression to the contrary, it is not to be presumed that Congress, by the passage of the Federal Communications Act, intended to circumscribe in any manner the power of the State in this respect. There is no such expression of Congressional intent to be found in the Statute under consideration here. We, of course, do not deny the supremacy of an act of Congress in a proper situation, but it is submitted that the Federal Communications Act is not an expression of Congressional intent to forbid the introduction of evidence obtained by tapping telephone wires into a trial in a state court.

In summary, then, it may be stated that petitioner was tried in a Texas court for a violation of Texas

Ct. App. 1946); *People v. Kelley*, 137 P. 2d 1 (Cal. Sup. 1943); *Rowan v. State*, 3 A. 2d 753 (Md. Sup. 1939).

¹¹ *Scholl v. State*, 235 S.W. 2d 639 (Tex. Crim. 1951), cert. den. 342 U.S. 834 (1951).

¹² *Townsend v. Yeomans*, 301 U.S. 441, 454 (1937); *Atchison Topeka & Santa Fe Railway Co. v. Railroad Commission of California*, 283 U.S. 380, 392 (1931); *Savage v. Jones*, 225 U.S. 501, 533 (1912).

law. Certain recorded telephone conversations were admitted into the evidence at this trial. This is not repugnant to the Constitution of the United States, nor is it a violation of State law. Although this evidence would have been inadmissible in a Federal criminal trial, it does not follow that the same holds true in a State court. On the contrary, it has been held that such evidence is admissible in the absence of a State law which forbids it. There is no such prohibition imposed by Texas law. It is therefore respectfully submitted that this is not a proper case for review by certiorari in this Honorable Court.

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and that the petition for writ of certiorari should be denied.

PRICE DANIEL
Attorney General of Texas

CALVIN B. GARWOOD, JR.
Assistant Attorney General

*Attorneys for Respondent,
The State of Texas.*

May, 1952.

APPENDIX

THE FEDERAL COMMUNICATIONS ACT

47 U.S.C.A. § 605

Section 605. *Unauthorized publication or use of communications.* "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having

become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

BRIEF FOR THE PETITION- ER.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.

FILED

OCT 31 1952

No. 130

41

HAROLD R. WILLEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1951

THOMAS SCHWARTZ, *Petitioner*

V.

THE STATE OF TEXAS, *Respondent*

**ON A WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF TEXAS**

MAURY HUGHES
Republic Bank Building
Dallas, Texas

REUBEN M. GINSBERG
Tower Petroleum Building
Dallas, Texas

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	3
Statutes involved	3
Statement of the case	4
Specification of errors to be urged	6
Summary of Argument	7
Argument:	
I. Where an Act of Congress creates a right in an individual and provides penal sanctions for the infringement thereof, such an act cannot be characterized as procedural, hence not binding on all states and judges as the supreme law of the land	8
II. The admission of recorded communications, intercepted without the consent of the sender, is a violation of a right created by Act of Congress, and the failure of the Court of Criminal Appeals of the State of Texas to recognize such right is a denial of the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States	14
Conclusion	24
Appendix	25

CITATIONS

Cases:	Page
Atchison, Topeka, and Santa Fe R. Co. vs. Railroad Commission of California, 283 U. S. 380 (1931)	19
Boske vs. Comingore, 177 U.S. 459, 20 S. Ct. 701 (1900)	12
Bowles vs. Angelo, 188 S. W. (2) 691 (Tex. Civ. App. 1945)	11, 12
Claflin vs. Houseman, 93 U.S. 130, 23 L. Ed. 833	11, 13, 15
Erie vs. Thompkins, 302 U.S. 671, 58 S. Ct. 50, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1937)	21
Goldman vs. U.S., 316 U.S. 129, 86 L. Ed. 1322 (1942)	17, 23.
Goldstein vs. U.S., 318 U.S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312 (1942)	10, 14
Harlem Check Cashing Corp. vs. Bell, 68 N.E. (2) 854, (N.Y. Ct. App. 1946)	23
Houston, E. & W. T. R. Co. vs. U.S., 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341	17
Hubin vs. State, 180 Md. 279, 23 A. (2) 706, cert. den. sub. nom. Neal vs. State of Mary- land, 316 U.S. 680, 62 S. Ct. 1107, 86 L. Ed. 1753	23

CITATIONS—Continued

	Page
Mondou vs. New York, N.H. & H.R. Co., 223 U.S. 1, 32 S. Ct. 169 (1912)	13, 15
Montalbano vs. State, 116 Tex. Crim. Rep. 242, 34 S. W. (2) 1100 (1930)	13
Nardone vs. U.S., 302 U.S. 379, 58 S. Ct. 275 (1937)	13, 15, 16
Nardone vs. U.S., 308 U.S. 338, 84 L. Ed. 307	13, 16
Olmstead vs. U.S., 277 U.S. 438 (1928)	23
People vs. Channell, 236 P. (2) 654 (Cal. App. 1951)	23
People vs. Kelly, 22 Cal. (2) 169, 122 P. (2) 1, cert. den., 320 U.S. 715, 64 S. Ct. 264, 88 L. Ed. 1420, rehearing den., 321 U. S. 802, 64 S. Ct. 527, 88 L. Ed. 1089	23
People vs. Stemmer, 83 N.E. (2) 141, aff'd by divided court, 336 U.S. 963 (1949)	23
Prudential Insurance Co. vs. Benjamin, 328 U. S. 408, (1946)	22
Rowan vs. State, 175 Md. 547, 3 A. (2) 753	23
Sampson vs. Channel, 110 F. (2) 754 (C.C.A. 1st), cert. den. 310 U.S. 650, 60 S. Ct. 1099	21
Savage vs. Jones, 225 U.S. 501 (1912)	19

CITATIONS—Continued

Page

Southeastern Underwriters Assn. vs. South Carolina, 322 U.S. 533, 58 S. Ct. 1162, 88 L. Ed. 1440	22
Southern Pac. R.R. Co. vs. Arizona, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915	22
State vs. Pavelich, 153 Wash. 379, 279 P. 1102	10
Testa vs. Katt, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810, 172 ALR 225 (1947)	13, 15
Townsend vs. Yeomans, 301 U.S. 441 (1937)	19
U.S. vs. Polakoff, 112 F. (2) 88 (C.C.A. 2d), cert. den. 311 U.S. 653, 85 L. Ed. 418	17
Weiss vs. U.S., 308 U.S. 321, 84 L. Ed. 298	17, 18, 23
Wolf vs. Colorado, 338 U.S. 25, 93 L. Ed. 1782	22

Statutes:

Federal Communications Act:

48 Stat. 1064, 47 U.S.C.A. 151 (Supp. 1951)	10, 19, 27
48 Stat. 1100, 47 U.S.C.A. 501 (Supp. 1951)	8, 11, 18, 26
48 Stat. 1103, 47 U.S.C.A. 605 (Supp. 1951)	2, 3, 6, 7, 16, 18, 25

CITATIONS—Continued

Page

Federal Bankruptcy Act:

- | | |
|--|----|
| 30 Stat. 548 (1898) Amended 52 Stat: 847
(1938), 11 U.S.C.A. 25a(10) (1940) | 12 |
|--|----|

Vernon's Code of Criminal Procedure:

- | | |
|----------------|--------|
| Article 727(a) | 12, 26 |
|----------------|--------|

Miscellaneous:

- | | |
|--|--------|
| 86 Congressional Record 3103 (1940) | 20 |
| F.C.C. Order, Docket No. 6787, May 20,
1948 | 20 |
| Hearings before a Subcommittee on Inter-
state Commerce Pursuant to Sen. Res.
224, 76th Cong. 3rd Sess. (1940) | 20 |
| Hearing before the Subcommittee to Investi-
gate Wire-tapping in the District of
Columbia, Sen. Rep. No. 2700, 81st Cong.
2d Sess. (1950) | 20 |
| Ramaswamy, The Commerce Clause in the
Constitution of the United States (1948) | 22 |
| Warren, Federal Criminal Laws and the
State Courts, 38 Harvard L. Rev. 545 | 21 |
| Westin, The Wire-tapping Problem, an
Analysis and a Legislative Problem, 52
Columbia L. Rev. 165 (Feb. 1952) | 19, 20 |
| Words and Phrases, Vol. 2, p. 392, Vol. 40,
p. 524 | 10 |

No. 730

IN THE
Supreme Court of the United States
OCTOBER TERM, 1951

THOMAS SCHWARTZ, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

**ON A WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF TEXAS**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of the State of Texas (R. 220-226) is reported at _____ Tex. Crim. Rep. _____, 246 S.W. (2) 174. The opinion on the motion for rehearing (R. 232-234) is reported at _____ Tex. Crim. Rep. _____, 246 S.W. (2) 179.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 14th day of November, 1951, to which petitioner filed a Motion For Réhearing, which motion was overruled on the 31st day of January, 1952. The jurisdiction of this Court is invoked under 28 U.S. Code annotated Section 1257(3). Defendant objected to the admission of certain phonograph records obtained in violation of Section 605, Title 47, U.S. Annotated, at the time of trial before the Criminal District Court No. 2 of Dallas County, Texas, the Honorable Henry King, District Judge, presiding, which objection was overruled and exception thereto duly noted. (R. p. 18). The objection was renewed in Defendant's First Amended Motion for a New Trial (R. p. 21), which motion was overruled, and judgment was entered (R. p. 28), whereupon defendant in open court excepted to such judgment and gave notice of appeal to the Court of Criminal Appeals of the State of Texas, at Austin, Texas. (R. p. 29). Defendant further raised the objection in his Bill of Exceptions No. 1 to which no qualification was appended by the said Henry King, District Judge (R. p. 30). Defendant cited as error the failure to exclude the evidence obtained in violation of Section 605, but the Court of Criminal Appeals of the State of Texas in its opinion did not pass on the question of whether or not a violation had occurred, but characterized the statute as a procedural one, hence not

applicable (R. p. 223). Defendant in his Motion For Rehearing again urged the court to correct the error of denying petitioner his right to have the phonograph records excluded as having been obtained in violation of Section 605 (R. p. 223), but the court in its opinion overruling the Motion For Rehearing stated that they adhered to their views expressed in the original opinion (R. p. 232). Whereupon petitioner obtained a stay of execution of 90 days pending the perfection of his application for a Writ of Certiorari in this Court. (R. p. 234). The Petition for a Writ of Certiorari to the Court of Criminal Appeals to the State of Texas was filed on April 22, 1952, and was granted on June 9, 1952.

QUESTION PRESENTED

Whether the Court of Criminal Appeals of the State of Texas erred in denying the supremacy of the Federal Communications Act, 48 Stat. 1103, 47 U.S. Code Annotated 605 (Supp. 1951) in violation of Article VI of the Constitution of the United States, thus denying petitioner a right claimed under a statute of the United States.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, *infra*, pp. 25-27.

STATEMENT OF THE CASE

On the 25th of March, 1950, your petitioner, Thomas Schwartz, was indicted by the Grand Jury of Dallas County, Texas, charged with being an accomplice to armed robbery. Specifically the indictment charged "that on February 17, 1950, one William Trent Jarrett robbed Mrs. Minnie Shortal of valuable jewelry, and that prior to the commission of said offense by the said William Trent Jarrett, the said defendant Thomas Schwartz did unlawfully and wilfully advise, command and encourage the said William Trent Jarrett to commit said offense, the said Thomas Schwartz not being present at the commission of said offense by the said William Trent Jarrett."

On the third trial of this case before a jury in the Criminal District Court of Dallas County, Texas, your petitioner was found guilty and the jury assessed a penalty of ninety-nine (99) years in the penitentiary. Upon appeal the case was affirmed by the Court of Criminal Appeals of Texas, to which Court this Writ of Certiorari is directed.

William Trent Jarrett and a man by the name of Lester Bennett were indicted for the actual robbery of Mrs. Minnie Shortal, a resident of Dallas County, Texas. After the affirmance of petitioner Schwartz' case, Bennett pleaded guilty before the Court and the Court sentenced him to serve eight years in the penitentiary. Jarrett was returned to the State of Kentucky, where he was already under a

life sentence before he escaped and came to Texas, no formal disposition having been made of the robbery case against him in Dallas, Texas.

The evidence reveals that on the afternoon of February 17, 1950, the robbers Jarrett and Bennett, armed with pistols, entered the fashionable home of the prosecutrix, Mrs. Minnie Shortal, and at pistol-point robbed her of certain diamond rings and jewelry. At the time of the perpetration of the robbery, they locked her in a closet and tied up with cords the butler and maid servants.

The robbers Bennett and Jarrett then took the jewelry in question to the pawn shop of your petitioner Thomas Schwartz to pawn or dispose of same. Your petitioner testified that he agreed to purchase the jewelry after same had been appraised by a competent appraiser. He denied he had any part in planning the robbery.

The defendants Jarrett and Bennett, the actual robbers, turned State's evidence and testified for the State, Jarrett being the State's star witness. Jarrett testified it was Schwartz who turned him over to the police.

Schwartz returned all of the jewelry to Mrs. Shortal through the witness Fritz, Captain of Detectives.

Under the law of the State of Texas the testimony of an accomplice must be corroborated and the principal corroboration relied upon by the State was an intercepted telephonic conversation which was recorded, the conver-

sation being between your petitioner Schwartz and the robber Jarrett.

The testimony reveals that while Jarrett was confined in jail, that he was taken by the District Attorney and his assistants into a room in the Sheriff's office, where a recording machine was set up. Under the direction of the District Attorney's staff, Jarrett telephoned to Schwartz at his pawn shop, and some fifteen or twenty conversations were intercepted and recorded without the knowledge or consent of your petitioner. Six of these recorded conversations were played to the jury on the phonographic record. It is the contention of your petitioner that without this testimony a conviction could not be had, and that "wire tapping" evidence brought about your petitioner's conviction.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Criminal Appeals of the State of Texas erred:

(1) In holding that Section 605, Title 47, U.S. Code Annotated, known as the Federal Communications Act, is a federal procedural statute and not binding on all states and judges as the supreme law of the land.

(2) In denying to petitioner his rights granted him by Section 605, Title 47, U.S. Code Annotated, against divulgence of intercepted communications without his consent and thereby denying the supremacy of an Act of

Congress in violation of Article VI of the Constitution of the United States.

SUMMARY OF ARGUMENT

The Court of Criminal Appeals of the State of Texas refused to give effect to Section 605 of the Federal Communications Act on the ground that it was a federal procedural statute and did not govern in Texas. Such characterization was erroneous and denied petitioner a right granted him under a federal statute. The rule in Texas pursuant to the mandate of this Court is that a state may not refuse enforcement of a federally created right. By characterizing the right in question as one prescribing merely a rule of court, the Court of Criminal Appeals of the State of Texas has by label sought to escape the mandate of this Court. It is the right itself and not the label which should govern. The right, being one which only the sender can invoke and for the infringement of which penal sanctions may be imposed, is clearly substantive. The use of erroneous characterization to avoid recognition of the right ought not to be permitted to stand.

Irrespective of label, the Federal Communications Act is an exercise of legislative authority by Congress in an area in which it may, if it chooses, exercise exclusive authority. It is necessary only that Congress manifest such an intent. The Act created a statutory system of regulation and control over interstate and foreign commerce, and interstate commerce, where necessary, for

the protection of interstate commerce. Section 605 was but one of the miscellaneous provisions in the general plan of regulation. It was adopted in furtherance of the free flow of commerce as a national public policy to prevent interference with and interception of interstate communications. The anomalies which result from any other construction defeat the very purpose of the section and withdraw the protection Congress sought to provide. The Act taken as a whole clearly manifests Congressional intent to promulgate a national policy for the protection of interstate communications. The failure of the Texas Court of Criminal Appeals to enforce such policy is a denial of the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States, which has denied petitioner a right claimed under a federal statute. Such a result cannot be permitted to stand.

ARGUMENT

I.

WHERE AN ACT OF CONGRESS CREATES A RIGHT IN AN INDIVIDUAL AND PROVIDES PENAL SANCTIONS FOR THE INFRINGEMENT THEREOF, SUCH AN ACT CANNOT BE CHARACTERIZED AS PROCEDURAL, HENCE NOT BINDING ON ALL STATES AND JUDGES AS THE SUPREME LAW OF THE LAND.

The statute, 48 Stat. 1103, 47 U.S.C.A. 605, 48 Stat. 1100, 47 U.S.C.A. 501, insofar as here pertinent, prohibits

"intercepting any communications" by any person "not being authorized by the sender," and further prohibits divulgence or publication "of such intercepted communication to any person." Moreover, "any person who willfully and knowingly does . . . any act . . . prohibited . . . shall upon conviction . . . be punished . . . by a fine of not more than \$10,000 or by imprisonment for a term not more than two years, or both."

The Court of Criminal Appeals makes it clear in its opinion that its decision affirming the conviction of petitioner rests primarily upon the intercepted communications between petitioner and Jarrett when it says:

"We feel that the recorded conversations between Jarrett and appellant hereinafter discussed under Bill of Exceptions No. 1 corroborate Jarrett's and Bennett's version of the transaction and disprove appellant's defense." (R. 222)

The Court recognized appellant's timely objections to the intercepted communications in claiming his right granted under the Federal Communications Act, but says:

"Without holding this evidence to have been obtained in violation of Section 605, we address ourselves rather to the question of the applicability of a Federal procedural statute to a trial in a State Court." (R. 223).

The Court of Criminal Appeals erred in characterizing the Federal Communications Act as a procedural statute. The particular provision involved is but one of the miscel-

laneous provisions of a regulatory act which was designed "for the purpose of securing a more effective execution of this policy by centralizing authority . . . and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication." (48 Stat. 1064, 47 U.S.C.A. 151).

The source books define a substantive law as one that conveys substantive right to an individual, a procedural law as one that directs the method of procedure to protect the substantive rights given the individual. *Words and Phrases*, Vol. 2, p. 392; Vol. 40, p. 524.

Rules of evidence constitute substantive law and cannot be governed by rules of court. *State vs. Pavelich*, 153 Wash, 379, 279 P. 1102.

This Court has held the right to be a personal one. In *Goldstein vs. U.S.*, 318 U.S. 114, 62 S.Ct. 1000, 86 L. Ed. 1312 (N.Y. 1942), this Court held that Section 605 is intended to protect only the sender and he alone can invoke it. Moreover, it was held in that case that intercepted communications are admissible against one not a party to the communications. It seems clear, therefore, that Congress created a substantive right in individuals to be free from interference in their use of communications facilities. Hence, the statute does not prescribe procedure, it creates a right in an individual which he alone can claim.

In order to further protect the right created by the Act, Congress established a general penalty for the viola-

tion of such right. 48 Stat. 1100, 47 U.S.C.A. 571. Clearly, then, a statute which creates a personal right in an individual, and makes the infringement of such right a felony, can in no sense be characterized as procedural.

The harm in such erroneous characterization as made by the Court of Criminal Appeals of the State of Texas is that it nullifies the intent of Congress, as construed by this Court, and in so doing ignores the mandate of Article VI of the Constitution of the United States.

If the Act is procedural in the sense that it merely prescribes a rule of court, then it would not be binding upon the courts and judges of the State of Texas. By so characterizing it, the Court avoided the necessity of expressly denying the supremacy of an Act of Congress. If the Federal Communications Act had expressly created a cause of action for the violation of Section 605, then "(T)he Act creating the cause of action, being enacted pursuant to the United States constitution, is the supreme law of the land, and binding on state courts and judges." *Bowles vs. Angelo*, 188 S.W. (2) 691, 694 (Tex. Civ. App. 1945). The court in the *Bowles* case cited *Claflin vs. Houseman*, 93 U. S. 130, 136; 23 L. Ed. 833, quoting therefrom:

"Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction."

Irrespective of characterization, Congress has the power to prescribe a rule which would become the supreme law of the land. The federal law has reached into procedure in other instances. This Court has held that internal revenue agents may not be compelled by State courts to testify in a manner prohibited by treasury department regulations. *Boske vs. Comingore*, 177 U.S. 459, 20 S.Ct. 701 (1900). Likewise, Congress has provided in the *Bankruptcy Act*, 30 Stat. 548 (1898) amended 52 Stat. 847 (1938), 11 U. S. Code Annotated 25a(10) (1940), that "no testimony given by him (a bankrupt) shall be offered in evidence against him in any criminal proceeding." Irrespective of whether it purports to govern procedure or not, and nothing in the statute lends support to the theory that it is a procedural statute, Section 605 created a right which, if it promulgated national public policy, became the supreme law of the land, binding on all judges in all states, "anything in the Constitution or Laws of any State to the contrary notwithstanding."

Under the Texas rule of *Bowles vs. Angelo*, 188 S.W. (2) 691, the Texas courts are required to give recognition to a federally created right. The failure to recognize the right in this case has denied the right in contravention of Article VI of the Constitution of the United States.

The Court of Criminal Appeals further justified its decision by reference to Article 727a, *Vernon's Code of Criminal Procedure*, as amended. Prior to the amendment, the provision operated to exclude, inter alia, evidence ob-

tained in violation of a statute of the United States of America. In 1929 the statute was amended to permit the use of evidence obtained in violation of a federal statute. *Montalbano vs. State*, 116 Tex. Crim. Rep. 242, 34 S.W. (2) 1100 (Tex. Crim. App. 1930). This statute precedes the adoption of Section 605 and cannot control where Congress has exercised its legislative power in an area in which it may constitutionally do so, and has by such legislation promulgated national policy. Moreover, state courts are under a duty to enforce federal statutes. In *Testa vs. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967, 172 A.L.R. 225 (1947), this Court held that state courts may not decline to enforce a federal statute on the ground that the federal statute contravenes the local policy of the State. To like effect are *Claflin vs. Houseman*, 93 U.S. 130, 136, 23 L. Ed. 833, and *Mondou vs. New York, N.H. & H. R. Co.*, 223 U.S. 1, 57, 32 S.Ct. 169 (1912).

This Court held in *Nardone vs. U.S.*, 302 U.S. 379, 58 S.Ct. 275 (1937) that the evidence obtained in violation of the right created by Section 605 must be excluded. In a subsequent hearing of this case, *Nardone vs. U.S.*, 308 U.S. 338, 340, 84 L. Ed. 307, 311, this Court, per Mr. Justice Brandfurter, said in reference to the opinion in the prior hearing:

"That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found

that the logically relevant proof which Congress outlawed, it outlawed because inconsistent with the ethical standards and destructive of personal liberty."

This Court has further held that the right created by Section 605 is a personal right and exists only in the sender, and he, alone, can claim it. *Goldstein vs. U. S.*, 318 U.S. 114, 62 S. Ct. 1000 (1942). It follows therefore that Congress having created a right in individuals, which only the individual whose right was infringed can claim, neither such right nor the statute creating it can be characterized as merely promulgating a rule of court. The refusal of the Court of Criminal Appeals of the State of Texas on the ground that it was not bound by the statute is clearly erroneous and should be reversed.

II.

THE ADMISSION OF RECORDED COMMUNICATIONS, INTERCEPTED WITHOUT THE CONSENT OF THE SENDER, IS A VIOLATION OF A RIGHT CREATED BY ACT OF CONGRESS AND THE FAILURE OF A STATE COURT TO RECOGNIZE SUCH RIGHT IS A DENIAL OF THE SUPREMACY OF AN ACT OF CONGRESS IN VIOLATION OF ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES.

The decision of the Court of Criminal Appeals of the State of Texas is erroneous because of the failure to recognize the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States. Even

if there were a fixed policy in Texas contrary to the policy expressed by Congress in Section 605, it would not alter the case.

"For the policy of the federal Act is the prevailing policy in every state. Thus, in a case which relied chiefly upon the *Claflin* and *Mondou* precedents, this Court stated that a state cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers:'" *Testa vs. Katt*, 330 U. S. 386, 393, 91 L. Ed. 967, 972.

It would appear, therefore, to be settled by this Court that rights created by valid laws of the United States are the Supreme Law of the land, and the judges in every state and all courts are bound thereby.

This Court in *Nardone vs. U.S.*, 302 U.S. 379, 58 S.Ct. 275 (1937), in construing Section 605, held that the words of Section 605 "forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person.' To recite the contents of the message in testimony before a court is to divulge its message." Neither the language of the statute nor the language of the Court's opinion limit in any way the tribunal in which this prohibition is to operate. The Court further states:

"Congress may have thought it less important that some offenders should go unwhipped of justice than

that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy embodied in the Fourth and Fifth Amendments of the Constitution." *Nardone vs. U.S.*, 302 U.S. 379, 383. 58 S.Ct. 275 (1937).

In subsequent hearing of this case, *Nardone vs. U. S.*, 308 U. S. 338, 340, 84 L. Ed. 307, 311, this Court, per Mr. Justice Frankfurter, made more explicit its views of Section 605 as an expression by Congress of public policy in protecting the realm of privacy, unprotected by the Constitution, but capable of infringement through zeal or design, by saying:

"... meaning must be given to what Congress has written, even if not in explicit language, so as to *effectuate the policy which Congress has formulated* (Italics added) ... To reduce the scope of Section 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve ... *would largely stultify the policy which compelled our decision in Nardone vs. United States.*" ... (Italics added)

The Court went on to declare, in reference to the decision in the first Nardone case, "that decision was not the product of a merely meticulous reading of technical language. *It was the translation into practicality of broad considerations of morality and public well-being.*" (Italics added)

During the same term in which the second Nardone case was decided, this Court by unanimous decision held in

Weiss vs. U. S., 308 U. S. 321, 84 L.Ed. 298 (1940), that since it is impossible to separate intrastate from interstate communications as they pass over telephone wires, Section 605 must be read to prevent both kinds of interception, that the exclusion of evidence obtained in violation of Section 605 is not limited to interstate and foreign commerce, but that Congress has the power, when necessary for the protection of interstate commerce, to regulate intrastate transactions. *Shreveport Rate Case (Houston, E. & W. T. R. Co. vs. U.S.)*, 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833.)

That there was an interception in the case at bar is beyond doubt. The circumstances here are virtually identical with those in *U.S. vs. Polakoff, et al*, 112 Fed. (2) 88 (C. C.A. 2nd), cert. denied 311 U.S. 653, 85 L.Ed. 418 (R. 28 31, 34-44, 212-215). The facts are clearly distinguishable from those in *Goldman vs. U.S.*, 316 U.S. 129, 86 L.Ed. 1322 (1942) and the rule there applied by this Court is not here applicable. Moreover, it is important to note that in the case at bar, the state did not merely offer testimony concerning the conversations, but the recordings themselves were offered in evidence (R. 34-44) and admitted in evidence by the trial judge, not by way of impeachment, but as direct evidence.

The decision of this Court in the Weiss case, supra, clearly shows that Congress did not limit the application of Section 605 to the Federal courts. Nowhere does the statute make any reference to courts. The Nardone cases,

together with the Weiss case, make it abundantly clear that the statute was the promulgation of a broad public policy in a field in which Congress was competent to legislate under authority of the Constitution. As this Court has said, any other holding would be denying "a decent respect for the policy of Congress." The language of the statute commands that:

... "no person not being authorized by the sender shall intercept any communication and divulge or publish . . . such intercepted communication to any person." *48 Stat. 1103, 47 U.S. Code Annotated 605.*

There are no words of limitation in this clause such as exists with reference to the other clauses in the section. The statute does not prescribe a rule of court or procedure, it states a rule of substance, for the infringement of which penal sanctions may be imposed. *48 Stat. 1100, 47 U.S. Code Annotated 501.* This Court, in the Weiss case, refused to engraft by construction restrictions and limitations which do not appear in the statute. The Court found that the changed wording in the second and fourth clauses had significance and were not inadvertent. There is nothing in the language of the statute to show that Congress intended to limit the prohibition to Federal courts. Indeed, there is no holding that there exists such a limitation as to any court. If the policy is to be effective and the public policy upheld, the Court cannot engraft restrictions and limitations which appear neither in the Section involved herein, nor in the Federal Communications Act. *48 Stat.*

1064, et seq., 47 U. S. Code Annotated 151, et seq., of which Section 605 is but one of the miscellaneous provisions.

"Wire tapping first became a matter of public concern in the twentieth century." *Westin, The Wire-Tapping Problem, An Analysis and a Legislative Problem*, 52 *Columbia L.Rev.* 165 (Feb. 1952). Section 605 was a part of the revision of the Radio Act of 1927, which legislation transferred jurisdiction over radio, telegraph and telephone to a new agency, the Federal Communications Commission. The statutory system clearly was a manifestation by Congress of their intent to exercise their power in this field. The rule that a Federal statute is presumed to affect only Federal jurisdiction as contended by the State in relying on *Townsend vs. Yeomans*, 301 U.S. 441 (1937); *Savage vs. Jones*, 225 U.S. 501 (1912); *Atchison, Topeka & Santa Fe Railway Co. vs. Railroad Commission of California*, 283 U.S. 380 (1931) does not apply where, as here, Congress has plainly manifested its intent to impose a uniform system of control and regulation over interstate and foreign communications and over intrastate communications where necessary for the protection of interstate commerce.

Should the Court refuse to so hold, the protection afforded by the statute and the underlying policy, which this Court has documented in great detail, against invasion of privacy and protection of commerce, would be narrowed to the vanishing point. Hearing before the Subcommittee

to Investigate Wiretapping in the District of Columbia, Sen. Rep. No. 2700, 81st Cong., 2nd Sess. (1950); Hearings before a Subcommittee on Interstate Commerce pursuant to Sen. Res. 224, 76th Cong., 3rd Sess. (1940); 86 Cong. Rec. 3103 (1940).

It is not always public officers who use wire-tapping to secure information in criminal cases. Telephone monitoring is frequently used by private persons for private purposes. Sometimes the tapping is done by government agencies, by Congressional or state legislative committees, or by rival political administrations. Sometimes tapping of conversations is done by law firms or corporations, and the art is certainly a stock-in-trade of innumerable private detective offices. Training centers have been set up under various sponsorship to train tappers. Private persons possess, use and even advertise the availability of the instruments necessary or provide the services for a fee. *Westin, The Wire Tapping Problem, 52 Columbia L. Rev. 165, 168 (Feb. 1952)*. It would seem that the Federal Communications Commission order, Docket No. 6787, May 20, 1948, requiring the tone warning whenever a person uses a recording device, can be disregarded with impunity.

If this Court holds Section 605 applicable only to Federal Courts, it becomes a simple matter for the federal officers to avoid its effect. Congress can grant, and on many occasions has granted, concurrent jurisdiction to state courts, even to prosecute federal crimes in state courts. In the early days of the republic, Congress did grant con-

current jurisdiction to the state courts to enforce federal penal statutes, and may constitutionally do so again. *Warren, Federal Criminal Laws and the State Courts*, 38 Harvard L. Rev. 545. Moreover, in most instances where a federal crime has been committed, there has likewise been a violation of a state penal statute, so that federal authorities could easily defer to state prosecuting authorities, and federal officers could testify in state courts as to the contents of any intercepted communications. It cannot be presumed that Congress intended or would tolerate any such result. Such a result could lead to an anomalous situation. Under the rule of *Erie vs. Thompson*, 302 U.S. 671, 58 S.Ct. 50, 304 U.S. 64, 58 S.Ct. 817 (1938), in a diversity case, the Federal district court must apply the substantive law of the state in which it sits. If a burden of proof question is characterizable as substantive for *Erie vs. Thompson* purposes, *Sampson vs. Channel*, 110 F. (2) 754 (C. C. A. 1st), cert. denied, 310 U.S. 650, 60 S.Ct. 1099, a fortiori, admissibility of evidence would be so regarded. If the local law were similarly characterized, it would then appear that in a diversity case a Federal district court would be obliged to admit wire-tap testimony, even though this Court has held otherwise. Unless Section 605 superseded applicable state rules, the state rule would govern. It clearly could not have been the intent of Congress to regulate interstate commerce in a manner in which the rules would vary from state to state. It appears clear that the Federal Communications Act, being a valid

exercise of Congressional authority in an area in which Congress is authorized to legislate, is an expression of national policy which supersedes local rules and must be given effect as the supreme law of the land pursuant to Article VI of the Constitution of the United States. No state may decline to enforce the statute because of any conflict with local law or policy. There are many instances in which Congress under its commerce powers has preempted the field of regulation and control. *Southern Pac. R.R. Co. vs. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; *Southeastern Underwriters Assoc. vs. South Carolina*, 322 U.S. 533, 58 S.Ct. 1162, 88 L. Ed. 1440. Congress can also defer to the states and permit them to occupy the field, *Prudential Insurance Company vs. Benjamin*, 328 U.S. 408 (1946), or can permit concurrent jurisdiction where to do so does not unduly burden interstate commerce. *Ramaswamy, The Commerce Clause In The Constitution of The United States.* (1948).

The interest sought to be protected by Section 605 pursuant to a system of national uniform regulation is not one in which Congress can be presumed to have deferred to the states. The very purpose of the section is to protect the integrity of interstate communications. Clearly, then, by the Act, Congress has established national policy, which precludes the states from refusing enforcement.

The situation in the case at bar is not to be confused with the rule of *Wolf vs. Colorado*, 338 U.S. 25, 93 L. Ed. 1782. That case concerns the Fourteenth Amendment,

and the admissibility of evidence obtained in violation of same. The right involved herein is not claimed to be a constitutional right, except insofar as a denial of such right by the State of Texas denies the supremacy of an Act of Congress. Neither is the *Olmstead* case, 277 U. S. 438 (1928) pertinent to the case at bar.

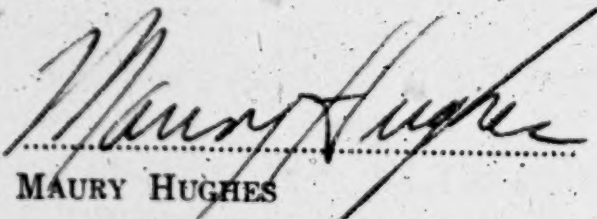
The cases cited by the Attorney General of Texas in his brief opposing the Writ of Certiorari either were prior to the *Weiss* case or come within the rule of the *Goldman* case. *Hubin vs. State*, 180 Md. 279, 23 A. (2) 706, cert. den. sub. nom. *Neal vs. State of Maryland*, 316 U.S. 680, 62 S.Ct. 1107, 86 L.Ed. 1753; *People vs. Channell*, 236 P. (2) 654 (Cal. App. 1951); *People vs. Kelly*, 22 Cal. (2) 169, 122 P. (2) 1, cert. den. 320 U.S. 715, 64 S.Ct. 264, 88 L.Ed. 1420, rehearing den. 321 U.S. 802, 64 S. Ct. 527, 88 L.Ed. 1089; *Rowan vs. State*, 175 Md. 547, 3 A. (2) 753. The New York cases, *People vs. Stemmer*, 83 N.E. (2) 141, aff'd. by divided court, 336 U.S. 963 (1949); *Harlem Check Cashing Corp. vs. Bell*, 68 N.E. (2) 854 (N.Y. Ct. App. 1946), cannot be deemed controlling in the absence of a clear ruling by this Court.

The issue presented here is one which only this Court can resolve. There is a marked increase in the invasions of privacy and encroachments on individual liberties resulting from interference with communications facilities. Congress promulgated a public policy for the protection of interstate commerce and there has been no change in the philosophy which gave rise to the public policy expressed

by Section 605, and no indication that the policy has been altered. The policy was not intended to permit the states to vary it in accordance with the local law of each state. The policy, if it so intended, could not be regarded as a "rule of morality and public well-being," nor could it have guaranteed the freedom from interference of interstate communications facilities.

CONCLUSIONS

For the reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of the State of Texas should be reversed.



.....

MAURY HUGHES

Republic Bank Building
Dallas, Texas

.....

REUBEN M. GINSBERG

Tower Petroleum Building
Dallas, Texas

COUNSEL FOR PETITIONER

APPENDIX

A. Statutes

48 Stat. 1103, 47 USCA 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person, other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to a proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a Court of Competent Jurisdiction, or on demand of other lawful authority;

And no person not being authorized by the sender shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;

And no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

And no person having received such intercepted communications or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto:

PR. VIDED, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

48 Stat. 1100, 47 USCA 501:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than \$10,000 or by imprisonment for a term not more than two years, or both.

Article 727 (a), Vernon's Code of Criminal Procedure:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or Laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

48 Stat. 1064, 47 USCA 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U.S.

FILED

NOV 3 1952

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. 41

THOMAS SCHWARTZ,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS,
RESPONDENT

PRICE DANIEL
Attorney General of Texas

CALVIN B. GARWOOD, Jr.
Assistant Attorney General

HUGH LIVERLY
Assistant Attorney General

HENRY WADE
District Attorney,
Dallas County, Texas

WILLIAM S. LOTT
Assistant Attorney General

RAY L. STOKES
Assistant District Attorney
Dallas County, Texas

SUBJECT MATTER INDEX

	Page
Preliminary Statement	1
Statement of the Case	2
Point One	4
The Federal Communications Act does not control the admissibility of evidence in a trial in a state court.	
Argument and Authorities	5
Point Two	19
The recordings were obtained without an "interception" of the telephone messages.	
Statement	19
Argument and Authorities	21
Conclusion	28
Appendix	29

TABLE OF AUTHORITIES

<i>Cases:</i>	Page
Adams v. New York, 192 U.S. 585	18
Atchison, Topeka & Santa Fe R. Co. v. Railroad Commission of California, 283 U.S. 380	18
Avery v. Alabama, 308 U.S. 444	16, 17
Beard v. Sanford, 110 F. 2d 527	6
Billeci v. United States, 184 F. 2d 394	23, 24
Black v. Impellitteri, 111 N.Y.S. 2d 402	14
Bowles v. Angelo, 188 S.W. 2d 691	16
Brown v. Mississippi, 297 U.S. 278	16
Bute v. Illinois, 333 U.S. 640	17
Carter v. Illinois, 329 U.S. 173	16
Claffin v. Houseman, 93 U.S. 130	16
Ex parte McDonough, 68 P. 2d 1020	13
Goldman v. United States, 316 U.S. 129	6, 25, 26
Goldstein v. United States, 316 U.S. 114	7
Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E. 2d 864	14
Hebert v. Louisiana, 272 U.S. 312	16
Hitzelberger v. State, 174 Md. 152, 197 A. 605	14
Houston E. & W. T. R. Co. v. United States, 234 U.S. 342	16
Hubin v. State, 180 Md. 279; 23 A. 2d 706	14
Iowa Central Ry. v. Iowa, 160 U.S. 389	9
McNabb v. United States, 318 U.S. 332	16, 17
Montalbano v. State, 116 Tex. Crim. 242, 34 S.W. 2d 1100	9
Nardone v. United States, 302 U.S. 379	7
Nardone v. United States, 308 U.S. 338	7
Neal v. Maryland, 316 U.S. 680	14
Olmstead v. United States, 277 U.S. 438	5, 6, 12
On Lee v. United States, 72 S.Ct. 967	27
People v. Channell, 236 P. 2d 654	14
People v. Kelley, 22 Cal. 2d 169, 137 P. 2d 1	13, 24
People v. McDonald, 165 N.Y.S. 41	12
People v. Onofrio, 151 P. 2d 158	13
People v. Pustau, 103 P. 2d 224	13
People v. Stemmer, 298 N.Y. 728, 83 N.E. 2d 141	14
People v. Vertlieb, 22 Cal. 2d 193, 137 P. 2d 437	13
Reitmeister v. Reitmeister, 162 F. 2d 691	22, 26
Rowan v. State, 175 Md. 547, 3 A. 2d 753	14
Savage v. Jones, 225 U.S. 501	18
Scholl v. State, 235 S.W. 2d 639	15
Schwartz v. State, 246 S.W. 2d 174	1
Slansky v. State, 192 Md. 94, 63 A. 2d 599	17
Snyder v. Massachusetts, 291 U.S. 97	16

TABLE OF AUTHORITIES

iii

Page

Soble v. Texas, 153 Tex. Crim. 629, 218 S.W. 2d 195	4
State v. Mara, 96 N.H. 463, 78 A. 2d 922	9
State v. Raasch, 201 Minn. 158, 275 N.W. 620	13
State v. Steadman, 216 S.C. 579, 59 S.E. 2d 168	14, 22
Stemmer v. New York, 336 U.S. 963	14
Testa v. Katt, 330 U.S. 386	16
Tot v. United States, 319 U.S. 463	18
Townsend v. Yeomans, 301 U.S. 441	18
Twining v. New Jersey, 211 U.S. 78	9
United States v. Coplon, 185 F. 2d 629	22
United States v. Fallon, 112 F. 2d 894	21
United States v. Gruber, 123 F. 2d 307	22
United States v. Guller, 101 F. Supp. 176	22
United States v. Lewis, 87 F. Supp. 97	23, 24, 26, 27
United States v. Polakoff, 112 F. 2d 888, 134 A.L.R. 607	21, 22, 24, 25, 26
United States v. Yee Ping Jong, 26 F. Supp. 69	23, 24
Weeks v. United States, 232 U.S. 383	8, 10
Weiss v. United States, 308 U.S. 321	7, 11, 14, 15
Welchek v. State, 93 Tex. Crim. 271, 247 S.W. 574	8
Wolf v. Colorado, 338 U.S. 25	8, 9, 10, 11
Wolf v. People, 117 Colo. 279, 187 P. 2d 926	10
Young v. Young, 56 R.I. 401, 185 A. 901	13

Constitutional Provisions:

Constitution of the United States, Fourth Amendment	6
Constitution of the United States, Fourteenth Amendment	9, 11, 13, 16, 17

Statutes:

Texas Code of Criminal Procedure (Vernon 1948), Article 727a	8
Federal Communications Act, 48 Stat. 1103, 47 U.S.C.A., § 605—	2, 5, 6, 11, 12, 13, 14, 15, 18, 23, 25, 27, 29, 30

Texts and Secondary Authorities:

Corpus Juris Secundum Vol. 22, p. 983	4
Wharton on Criminal Evidence Vol. 1, p. 601	4
Wigmore on Evidence Vol. 1, pp. 204, 205	17
Vol. 2, pp. 789-791	4
Vol. 7, p. 616	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. 41

THOMAS SCHWARTZ,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS,
RESPONDENT

PRELIMINARY STATEMENT

Petitioner was charged by indictment (R. 2-4) and convicted of being an accomplice to the crime of robbery after a trial in Criminal District Court No. 2 of Dallas County, Texas. His punishment was assessed at ninety-nine years' confinement in the State Penitentiary (R. 12). Upon appeal to the Court of Criminal Appeals of Texas, the conviction was affirmed and a motion for rehearing overruled.¹

The recordings of several telephone conversations to which petitioner was a party were used by the State in evidence at the trial. Petitioner urges that

¹ *Schwartz v. State*, 246 S. W. 2d 174 (Tex. Crim. 1952).

this constituted a violation of Section 605 of the Federal Communications Act, 48 Stat. 1103, 47 U.S.C.A. § 605, which forbids the divulgence of intercepted wire and radio communications without consent of the sender.²

It is respondent's position that the evidence in question was admitted in full compliance with both federal and state law. To be specific, the telephone messages were not "intercepted" as that term is used in Section 605 of the Federal Communications Act. The recordings were made with the knowledge and consent of one of the parties to the conversations. There was no trespass upon petitioner's property, and no wires were "tapped." But even assuming that an interception did in fact occur, the records were properly received in evidence since the Federal Communications Act does not regulate the admissibility of evidence in a state criminal trial.

STATEMENT OF THE CASE

The facts concerning the offense itself are described in detail in the opinion of the Court of Criminal Appeals.³ Since they are of little importance to a determination of the issues presented here, a short summary for the convenience of the Court should suffice for the purposes of this brief.

Petitioner Thomas Schwartz, a Dallas, Texas pawnbroker, entered into a conspiracy with William Trent Jarrett and Lester Emmett Bennett, whereby they planned to commit a series of robberies and

² This provision is reproduced in the appendix, pages 29, 30.

³ 246 S. W. 2d at pp. 175, 176. This portion of the opinion below may also be found R. 220-222.

equally divide the proceeds. Schwartz was to lay the plans, select the victims, and furnish Jarrett and Bennett with the necessary firearms and other equipment. Jarrett and Bennett, in turn, were to carry out the robberies and deliver the spoils to Schwartz for disposal.

This proceeding was instituted as a result of a robbery executed pursuant to their scheme. Jarrett and Bennett forcibly entered the Dallas residence of Dr. W. W. Shortal, tied up the maid and yardman, and at gunpoint they forced Mrs. Shortal to surrender her diamond rings and what money she had in her purse. Then they locked her in a second floor closet and left to deliver the jewelry to Schwartz.

Jarrett was apprehended by the police soon after the robbery, and subsequently he made a number of telephone calls to Schwartz from the Sheriff's office (R. 105). Twelve to fifteen of their conversations were recorded, and six were used by the State in evidence at Schwartz's trial (R. 212-215). Before the recordings were played for the jury, Jarrett testified as to what had been said over the telephone, and this tended to show that Schwartz was the motivating force behind the robbery (R. 121, 122). Schwartz, testifying in his own defense, admitted that he had had a series of telephone conversations with Jarrett and that he had suspected all along that they were being recorded. But he also said that he continued to talk to Jarrett only in the hope of obtaining knowledge of the whereabouts of Bennett, who at that time was still at large. The information thus obtained, he said, was passed on to

the police (R. 173, 174). In short, Jarrett's testimony was evidence of Schwartz's complicity in the crime, while Schwartz claimed that he was only attempting to aid the police. Thus there was drawn an issue of fact concerning the substance and purpose of the telephone conversations.

Therefore, the State on rebuttal introduced the recordings in order to corroborate Jarrett's story of the conspiracy. Without reference to the specific questions of law which must be decided here, these recordings were competent evidence to show exactly what was said, the tone of voice and manner of speech of the parties, and the general purpose of the conversations.* Jarrett's testimony was evidence that there had been certain telephone conversations between himself and Schwartz, and Schwartz, admitting that the conversations did take place, relied upon his version of what was said as a possible defense. One may not complain of the receipt in evidence of facts which he too introduces.† Both Schwartz and Jarrett admitted to having been parties to these conversations, and the recordings were used merely to settle the question of what had been said.

POINT ONE

The Federal Communications Act does not control the admissibility of evidence in a trial in a state court.

* 2 Wigmore on Evidence (3rd ed) 789-791, §669; 7 Wigmore on Evidence (3rd ed) 616, §2155; 1 Wharton on Criminal Evidence (11th ed.), §379; 22 C.J.S. 983, Criminal Law, §644.

† *Soble v. Texas*, 153 Tex. Crim. 629, 218 S. W. 2d 195 (1949), cert. den. 338 U. S. 866.

ARGUMENT AND AUTHORITIES

For the purposes of argument under respondent's point one, it will be assumed that the evidence in question was obtained by means of tapping telephone wires, that an "interception" did in fact occur. Although Section 605 of the Federal Communications Act has been held to be a limitation upon the power of a federal court to admit or exclude evidence, there are compelling reasons why this doctrine should not be extended to affect the admissibility of evidence in a trial in a state court.

It has already been noted that the recorded telephone conversations were obtained without trespass upon petitioner's property. This being true, the instant proceeding comes within the decision of this Court in *Olmstead v. United States*, 277 U. S. 438 (1928), wherein it was held that the use of evidence obtained by means of tapping telephone wires in a criminal trial does not constitute an invasion of any of the rights extended to the accused by the Constitution of the United States, provided there is no trespass involved. In that case it was further held that a state statute making the interception of telephone messages a misdemeanor cannot affect the rules of evidence applicable in federal criminal cases. However, the Court added that "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence." (Emphasis supplied).

* 277 U. S. at pp. 465, 466.

The rule of the *Olmstead* case remains in full force and effect today. This was made quite clear in a more recent decision, in which the Court made the following statement:

"The petitioners ask us, if we are unable to distinguish *Olmstead v. United States*, to overrule it. This we are unwilling to do. That case was the subject of prolonged consideration by this Court. The views of the Court, and of the dissenting justices, were expressed clearly and at length. To rehearse and reappraise the arguments pro and con, and the conflicting views exhibited in the opinions, would serve no good purpose. Nothing now can be profitably added to what was there said. It suffices to say that we adhere to the opinion there expressed."

Wire tapping is not an unlawful search and seizure within the scope of the Fourth Amendment to the Constitution, and petitioner does not contend that he has been deprived of any right guaranteed by the Fourteenth Amendment. Therefore, no constitutional question is presented here. If petitioner has any right to be protected, it arises from a statute and not from the Constitution. *Beard v. Sanford*, 110 F. 2d 527 (5th Cir. 1940), cert. den. 310 U. S. 635.

In 1934, Congress enacted the Federal Communications Act, of which Section 605 is important here. This provision renders it unlawful to divulge the contents of any intercepted telephone, telegraph, or radio communication without the consent of the sender. The Supreme Court of the United States has

¹ *Goldman v. United States*, 316 U. S. 129, 135, 136 (1942).

ruled that the Act bars from federal criminal trials testimony or transcriptions of what was overheard by means of such an interception. However, the Court's first decision applied only to communications made in interstate commerce. *Nardone v. United States*, 302 U. S. 379 (1937). Next the Court held inadmissible not only direct evidence thus obtained, but also evidence indirectly traceable to the interception. *Nardone v. United States*, 308 U. S. 338 (1939). In another decision handed down about the same time, the doctrine was extended to include intrastate, as well as interstate, messages. *Weiss v. United States*, 308 U. S. 321 (1939). However, records of the intercepted messages may be used to induce persons to testify for the prosecution, and such testimony is admissible against one not a party to the conversations. The right thus created is purely personal and may be exercised only by the sender of the message. *Goldstein v. United States*, 316 U. S. 114 (1942).

Thus there has been a metamorphosis of the statute from a ban against wire tapping into a rule of evidence for federal courts.

The Act lays down no explicit mandate for the guidance of the courts with regard to the admission or exclusion of evidence obtained in this manner. It became a rule of evidence only by judicial implication, not by express provision. *And as a rule of evidence it has been held applicable to federal trials only.* Each one of the cases in which the Federal Communications Act was applied in this manner was instituted by federal prosecuting authorities and tried in a federal district court. The illegally obtained evidence was held to be inadmissible in federal courts

on the same theory applied by this Court in *Weeks v. United States*, 232 U. S. 383 (1914), as to evidence obtained by an unreasonable search and seizure. However, the rule of the *Weeks* case applies only to federal courts. It does not place any limitations upon the use of evidence in a state criminal proceeding. *Wolf v. Colorado*, 338 U. S. 25 (1949).

The recordings were perfectly admissible in evidence under Texas law. In *Welchek v. State*, 92 Tex. Crim. 271, 247 S. W. 574 (1923), the Texas Court of Criminal Appeals specifically rejected the doctrine of the *Weeks* case in holding that evidence obtained by an unreasonable search and seizure, in violation of the Texas Constitution, is admissible. That decision, however, was superseded by the enactment of Article 727a, Texas Code of Criminal Procedure (Vernon 1948), which now reads as follows:

“No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.”

This statute formerly provided that evidence obtained in violation of the Constitution or laws of either the United States or Texas, was inadmissible in a Texas criminal trial.* It was amended, however,

* Article 727a, before amendment to its present form read as follows:

“No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.”

and now the only remaining federal restriction on the admissibility of evidence in Texas criminal proceedings is the question of whether it was obtained in violation of the Constitution of the United States. Thus the Texas courts are not bound in this respect by federal statutes.⁹ There is no Texas statute or judicial precedent which forbids the admission of evidence of the kind complained of here.

No provision of the Constitution of the United States having been violated by the admission of the evidence in question, the decision of the Court of Criminal Appeals in this respect is final. The manner in which a state court of last resort interprets the statutes of its own state, is not subject to review by this Court. The action of the state court is decisive of the issue so long as it does not result in the denial of any right protected by the Fourteenth Amendment. *Twining v. New Jersey*, 211 U. S. 78, 91 (1908); *Iowa Central Ry. v. Iowa*, 160 U. S. 389, 393, 394 (1896).

In *Wolf v. Colorado*, *supra*, this Court recently upheld the right of a state court to accept or reject evidence according to the laws of the individual state.¹⁰ There the petitioner, a physician, was accused of participation in a conspiracy to commit abortion, in violation of a Colorado penal statute. Without first obtaining a search warrant, local peace officers entered his office and seized his professional records—clearly an unconstitutional search and

⁹ Cf. *Montalbano v. State*, 116 Tex. Crim. 242, 34 S. W. 2d 1100 (1931).

¹⁰ See also *State v. Mara*, 96 N. H. 463, 78 A. 2d 922 (1951).

seizure.¹¹ These records were admitted in evidence at the trial, and this Court upheld the trial judge's action in allowing them to be used. Under the doctrine of the *Weeks* case, similar evidence would have been clearly inadmissible in a case tried in a federal court, but the mere fact that certain evidence is inadmissible in a federal trial does not render evidence obtained in the same manner inadmissible in state criminal proceedings.

Petitioner has attempted to distinguish the *Wolf* case from the instant proceeding on the ground that we are not concerned here with rules governing the admissibility of evidence. On the contrary, we are concerned with nothing else. The crux of this entire case is the question of whether certain recorded telephone conversations were properly received in evidence in a criminal trial in a state court. The Court in the *Wolf* case stated the issue that was decided there in a manner which precisely phrases the question which must here be resolved, as follows:

"The precise question for consideration is this: Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States . . ."¹²

¹¹ *Wolf v. People*, 117 Colo. 279, 187 P. 2d 926 (1947).

¹² 338 U. S. at pp. 25, 26.

The question was of course answered in the negative. If anything, the petitioner in the *Wolf* case presented a stronger argument for reversal than that which is raised here. There the evidence in question was obtained in violation of both the Colorado Constitution and, through the application of the Fourteenth Amendment, the Constitution of the United States. Here the most that can be said is that a federal statute was violated. To uphold the admissibility of the evidence used in the *Wolf* case and then exclude that which was introduced here would certainly be inconsistent.

Much of petitioner's argument for reversal is based upon a reliance on *Weiss v. United States*, *supra*. It is urged as authority for the proposition that evidence obtained by intercepting telephone conversations is inadmissible in state as well as federal trials. We readily concede that the decision extends the application of the Federal Communications Act to intrastate messages, but it does not by any means follow that the Act prohibits the use of such evidence in a trial in a state court, involving matters of state law only. In the *Weiss* case, this Court reviewed the action of a federal district court. There was presented no question concerning the admissibility of evidence in a state trial. The only question before the Court was whether a federal trial court properly received evidence which was obtained by the interception of intrastate telephone communications. This case set forth the federal rule, but it is not authority upon the admissibility of evidence in state courts.

This Court has not yet written an opinion in which

it considered the effect of the Federal Communications Act upon the admissibility of evidence in a state court. However, the question has been presented to state courts many times, and without exception the admissibility of the evidence was sustained. Several of these cases were decided without reference to the Federal Communications Act, but in the vast majority the courts rejected arguments almost identical to that which is raised here. Several were approved by this Court by denial of certiorari, *one by direct affirmance*. It is recognized that a denial of certiorari is not necessarily an indication of this Court's unequivocal approval of the opinion below, and that, as the court of last resort for the entire nation, it is not always bound by the decisions of inferior courts. But it is respectfully submitted that when a particular question has been presented many times before, to the highest courts of various states, with the result inevitably the same, the decisions of the state courts are most authoritative.

The first such case, *People v. McDonald*, 165 N. Y. S. 41 (1917), was used as an authority for this Court's decision in the *Olmstead* case.¹³ Although it was decided before the passage of the Federal Communications Act, there was in existence a somewhat similar New York penal statute designed to insure the privacy of telephone conversations. In violation of this statute, police tapped the telephone wire leading into the defendant's home and listened to a number of conversations to which he was a party. The defendant was convicted on the basis of the evi-

¹³ 277 U. S. at p. 469.

dence obtained in this manner, and on appeal its admissibility was upheld.

There are several more recent decisions, both civil and criminal, in which evidence obtained by intercepting telephone messages was held admissible without reference to the Federal Communications Act. *People v. Pustau*, 103 P. 2d 224 (Cal. App. 1940); *State v. Raasch*, 201 Minn. 158, 275 N. W. 620 (1937); *Young v. Young*, 56 R. I. 401, 185 A. 901 (1936). It has also been held that such evidence is competent in a grand jury investigation. *Ex parte McDonough*, 68 P. 2d 1020 (Cal. App. 1937). In each of the criminal cases, the accused was the "sender" of the intercepted message.

In *People v. Kelley*, 22 Cal. 2d 169, 137 P. 2d 1 (1943), appeal dism. 320 U. S. 715, the Supreme Court of California sustained the admissibility of evidence obtained by the interception of telephone messages over the objection that its admission violated not only the Federal Communications Act, but also the Fourteenth Amendment to the Constitution of the United States. There the police entered the defendant's apartment, answered his telephone, and listened to his callers place bets on horse races. Although the defendant was not the sender of the messages, the case is pertinent here because of its adherence to the doctrine that a state court should not be required to make a collateral investigation of the source of competent evidence offered by the prosecution.¹⁴

¹⁴ See also *People v. Vertlieb*, 22 Cal. 2d 193, 137 P. 2d 437 (1943); *People v. Onofrio*, 151 P. 2d 158 (Cal. App. 1944). These were decided on the basis of the *Kelley* case and arose from substantially similar facts.

Another precedent appropriate here is *Hubin v. State*, 180 Md. 279, 23 A. 2d 706 (1942), cert. den. *sub nom. Neal v. Maryland*, 316 U. S. 680. Petitioner asserts that this decision presents facts distinguishable from the instant proceeding in that the defendant was not the sender of the intercepted messages. It is impossible to determine from a reading of the Court's statement of the facts whether this is true or not, but in view of the principle enunciated therein, this is immaterial. The Court simply held that the Federal Communications Act has no effect upon the admissibility of evidence in a state court. After summarizing the decision in *Weiss v. United States*, the Court made the following statement:

"... However, in view of the decision in the *Olmstead* case, we hold that evidence procured by wire tapping is not prohibited in State Courts, either by the Federal Constitution or by the Federal Communications Act. . . ."¹⁵

Despite any quibble that might be raised about the applicability of the foregoing cases, there are others which cannot be distinguished from this proceeding. In each of these cases it was squarely held that Section 605 of the Federal Communications Act does not prohibit, in a trial in a state court, the admission of evidence obtained by intercepting telephone messages.¹⁶ In each of these cases the de-

¹⁵ 23 A. 2d at p. 709.

¹⁶ *State v. Steadman*, 216 S. C. 579, 59 S. E. 2d 168 (1950), cert. den. 340 U. S. 850; *People v. Stemmer*, 298 N. Y. 728, 83 N. E. 2d 141 (1948), *affd.* *Stemmer v. New York*, 336 U. S. 963; *People v. Channell*, 236 P. 2d 654 (Cal. App. 1951); *Harlem Check Cashing Corp. v. Bell*, 296 N. Y. 15, 68 N. E. 2d 854 (1946); *Rowan v. State*, 175 Md. 547, 3 A. 2d 753 (1939); *Hitzelberger v. State*, 174 Md. 152, 197 A. 605 (1938). See also *Black v. Impellitteri*, 111 N. Y. S. 2d 402 (1952).

endant was the sender of the communications. It is true that the *Rowan* and *Hitzelberger* cases antedated this Court's decision in the *Weiss* case, and therefore any statements to the effect that the Act regulates only the interception and divulgence of interstate messages are now overruled. However, the final decision in each case was reached independently of any such dictum, and as regards the effect of the Act on the admissibility of evidence in state courts, the decisions remain unaffected by the *Weiss* case.

Thus in sustaining the admissibility of the recorded telephone conversations in question, the Court of Criminal Appeals merely held in accordance with a long line of decisions which unanimously authorized its action.¹⁷

Much of the petitioner's argument for reversal is based upon the concept of the supremacy of an act of Congress over the laws of individual states. "It is contended that the Federal Communications Act, being a valid exercise of Congressional authority in an area in which Congress is authorized to legislate, is an expression of Congressional policy which supersedes local rules and must be given effect as the supreme law of the land. . . ."¹⁸ In its proper sphere, an act of Congress of course supersedes the laws of a state. However, the Federal Communications Act does not undertake to regulate the admission of evidence in state courts.

¹⁷ Although it does not appear in the opinion, the Court of Criminal Appeals rejected a similar contention last year. This Court denied certiorari. *Scholl v. State*, 235 S. W. 2d 639 (Tex. Crim. 1951), cert. den 342 U. S. 834.

¹⁸ Petition for certiorari, pp. 27, 28.

Reliance is placed upon decisions in which it was held that a right of action derived from a federal statute may be enforced in a state court.¹⁹ While it is true that Congress can compel a state court to enforce a federal statute, it does not follow that it can thereby prescribe the manner in which the local courts must enforce its legislation. It is well established that Congress may regulate intrastate transactions in order to remove a burden from interstate commerce. *Houston E. & W. T. R. Co. v. United States*, 234 U. S. 342 (1914). It is equally well established that a state is free to regulate the proceedings in its courts in accordance with its own conception of social policy and justice, being limited only by due process. *Carter v. Illinois*, 329 U. S. 173, 175 (1946); *Avery v. Alabama*, 308 U. S. 444, 446 (1940); *Brown v. Mississippi*, 297 U. S. 278 (1936); *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934).

The Fourteenth Amendment provides the only basis for federal supervision of state criminal proceedings. Congress has no such supervisory authority. As this Court, in *McNabb v. United States*, 318 U. S. 332, 340 (1943), pointed out:

“... For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those ‘fundamental principles of liberty and justice,’ *Hebert v. Louisiana*, 272 U. S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the

¹⁹ *Testa v. Katt*, 330 U. S. 386 (1947); *Claflin v. Houseman*, 93 U. S. 130 (1876); *Bowles v. Angelo*, 188 S. W. 2d 691 (Tex. Civ. App. 1945).

federal courts is not confined to ascertainment of Constitutional validity. . . .”

Even due process leaves much room for the freedom which the Constitution reserved to the states for the exercise of their police power and for their control over the procedure to be followed in the criminal proceedings held in their respective courts. The Fourteenth Amendment has not been interpreted so as to impose uniform procedures upon the courts of the individual states, and it recognizes that, as between federal and state courts, there are many procedural differences. *Bute v. Illinois*, 333 U. S. 640, 649 (1948); *Slansky v. State*, 192 Md. 94, 63 A. 2d 599 (1949). It “was not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial.” *Avery v. Alabama*, *supra*, pp. 446, 447.

“In the *State Courts*, the legislation of each jurisdiction is supreme, except so far as limited by the Federal Constitution. Consequently, rules of Evidence in the State Courts are not controlled in any manner by the Federal statutory legislation, although they are subject to such limitations as may be prescribed in any Federal constitutional provisions applicable to State legislation.” 1 Wigmore on Evidence (3rd ed.) 204, 205, § 6e. Here, of course, we are not concerned with any constitutional question, but only with the application of a federal statute which has been held to provide a rule of evidence under certain circumstances, and therefore it is immaterial whether the nature of the right thus created is substantive or procedural.

Under the authority of its inherent police power, the State of Texas has undertaken to regulate extensively its criminal prosecutions and the admissibility of evidence therein. A federal statute must be presumed to affect only federal jurisdiction and not to supersede a state's exercise of police power, unless there is a readily apparent manifestation of Congressional intent that it should operate thus.²⁰ In the absence of a clear and unequivocal expression to the contrary, it is not to be presumed that Congress, by the passage of the Federal Communications Act, intended to circumscribe the power of a state to control the admissibility of evidence in trials in its own courts.

Section 605 of the Act was designed to penalize wire tapping and other similar activities which interfere with the use of the telephone, telegraph, and radio. It has become a rule of evidence only by judicial implication. While this policy is perhaps meritorious insofar as it applies to federal courts, it would be an unprecedented invasion of the powers inherently reserved to the states if it were extended to state criminal proceedings. Congress, of course, has the power to prescribe what evidence is to be received in the Courts of the United States, *Tot v. United States*, 319 U. S. 463, 467 (1943), but also "it is within the established power of the state to prescribe the evidence which is to be received in the courts of its own government." *Adams v. New York*, 192 U. S. 585, 599 (1904).

²⁰ *Townsend v. Yeomans*, 301 U. S. 441, 454 (1937); *Atchison, Topeka & Santa Fe R. Co. v. Railroad Commission of California*, 283 U. S. 380, 392, 393 (1931); *Savage v. Jones*, 225 U. S. 501, 533 (1912).

Petitioner was tried in a Texas Court for a violation of Texas law. Certain recorded telephone conversations were used in evidence at his trial. This is not repugnant to the Constitution of the United States, nor is it a violation of State law. Although similar evidence might have been inadmissible in a federal court, it does not follow that the same holds true in a state court. On the contrary, such evidence is admissible in the absence of a state law which forbids it, and there is no such prohibition imposed by Texas law. Therefore it is respectfully submitted that the evidence in question was properly received.

POINT TWO

The recordings were obtained without an "interception" of the telephone messages.

STATEMENT

It has been noted above that Jarrett, in cooperation with local peace officers, made the telephone calls from the office of the Sheriff of Dallas County. Schwartz admitted that he had talked to Jarrett, and moreover he testified that he had suspected all along that their conversations were being recorded (R. 173). However, at the trial the two presented conflicting testimony as to what had actually been said, so the State on rebuttal introduced the recordings in order to corroborate the testimony of Jarrett.

These records were made in the Sheriff's office by means of a "pick-up." (R. 105). They were

transcribed by J. E. Sellers, who for some fifteen years had been engaged in the business of making recordings and transcriptions. This was accomplished through the use of an induction coil, a sensitive receiving apparatus similar in many respects to an ordinary hearing aid. It was placed in close proximity to the telephone used by Jarrett, and through it Sellers was able to record not only Jarrett's voice, but also the voice of Schwartz as it was heard through the receiver. Sellers, with the knowledge and consent of Jarrett, listened to these conversations as they were being recorded (R. 212-215).

In its opposition to petitioner's first amended motion for a new trial, the State emphatically denied that these recordings were made by means of tapping telephone wires (R. 26). It attached to its controverting motion an affidavit in which Sellers minutely described the manner in which the telephone conversations had been transcribed (R. 28).²¹ There was never any physical connection between the listening apparatus and the telephone, and no wires were "tapped." It is upon the basis of these facts that respondent takes the position that there was no "interception" of the telephone messages within the contemplation of Section 605 of the Federal Communications Act.

²¹ Through an error in the preparation of the transcript, the words "There was at no time any connection made" were omitted from the last line of this affidavit. A certificate executed by the District Clerk, containing a true and authenticated copy of the affidavit has been filed in the office of the Clerk of this Court, and it has been reproduced in the appendix to this brief, pages 30, 31.

ARGUMENT AND AUTHORITIES

In taking this position, respondent is not unaware of Judge Learned Hand's opinion in *United States v. Polakoff*, 112 F. 2d 888 (2d Cir. 1940), 134 A. L. R. 607, cert. den. 311 U. S. 653. However, this is but one of several cases decided by the lower federal courts on the basis of facts essentially the same as those reflected in the record of the instant proceeding. These decisions are in conflict, and this is a question upon which the Supreme Court of the United States has not yet written an opinion. Therefore it is logical that it too should be decided in this case.

In the *Polakoff* case, the defendant was accused of a conspiracy to obstruct justice. For a sum of money, he had agreed to intervene in the criminal prosecution of one Kafton, by the exercise of personal influence with an Assistant United States District Attorney. In cooperation with the Federal Bureau of Investigation, Kafton made several telephone calls to the defendant, and their conversations were overheard and recorded on a telephone extension. The transcriptions were introduced in evidence at the defendant's trial, and the conviction was reversed on the ground that the evidence was inadmissible. Not only was it held that the messages were "intercepted," but also that the interceptors could not reveal what they had overheard without the consent of both parties to the conversations.²²

²² Companion case to the same effect: *United States v. Fallon*, 112 F. 2d 894 (2d Cir. 1940).

Thus we have a synopsis of the case upon which petitioner chiefly relies. Except for the precise manner in which the messages were overheard—there over an extension telephone and here by the use of an induction coil—it is virtually indistinguishable from the case at bar. There are other authorities which might also be cited in support of the principles enunciated therein.²³ However, the question is still an open one as far as this Court is concerned, therefore it is earnestly and respectfully submitted that the decision in the *Polakoff* case is erroneous, and that the dissenting opinion therein represents the correct approach to the problem. Other courts of equal dignity have rejected its doctrine, and this Court should not adopt it.

In *United States v. Guller*, 101 F. Supp. 176 (E. D. Pa. 1951), the accused was convicted on the basis of evidence obtained by a federal narcotics agent, who, on an extension telephone; overheard conversations between the accused and an informer. It was held that the term "interception" contemplates the interjection of an independent receiving device between the lips of the sender and the ear of the receiver, and that therefore no interception had occurred. The same result was reached in *State v. Steadman*, 216 S. C. 579; 59 S. E. 2d 168 (1950), cert. den. 340 U. S. 850, in which the messages were recorded by means of a device attached to the telephone instrument through which the informer talked

²³ *United States v. Coplon*, 185 F. 2d 629 (2d Cir. 1950), cert. den. 72 S. Ct. 362; *Reitmeister v. Reitmeister*, 162 F. 2d 691 (2d Cir. 1947); *United States v. Gruber*, 123 F. 2d 307 (2d Cir. 1941).

to the defendant—almost identical to the method employed here.

In *United States v. Yee Ping Jong*, 26 F. Supp. 69 (W. D. Pa. 1939), the recorded telephone messages introduced in evidence were obtained by means of a device attached to the *wire* inside the house from which an informer made his calls to the defendant. The recordings were held admissible on the ground that there had been no "interception," within the contemplation of Section 605 of the Federal Communications Act. On page 70, the Court made the following statement: .

"The manner in which the conversation in question was recorded does not seem to present such an interception as is contemplated by the quoted statute. Webster's New International Dictionary defines the verb 'intercept' in part as follows: 'To take or seize by the way, or before arrival at the destined place; * * *'. *The call to the defendant was made by Agent White, and the conversation between his interpreter and the defendant was not obtained by a 'tapping of the wire' between the locality of call and the locality of answer by an unauthorized person, but was, in effect, a mere recording of the conversation at one end of the line by one of the participants. It differed only in the method of recording from a transcription of a telephone conversation made by a participant. We are of the opinion that the admission of the record in evidence was not error.*" (Emphasis supplied).

United States v. Lewis, 87 F. Supp. 970 (D. D. C. 1950), rev. on other grds. *Billeci v. United States*, 184 F. 2d 394 (D. C. Cir. 1950), presents substan-

tially the same facts as those before the Court in this case. Some of the messages were recorded, and this was accomplished by a mechanical device attached to or placed in proximity to the telephone. Others were transcribed in shorthand by a stenographer listening on an extension. "*It is important to observe that in each instance one of the parties to the conversation knew it was being recorded and either requested that this be done or acquiesced in that course.*"²⁴ It was held that no interception had occurred. On page 973, Judge Holtzoff stated his holding thus:

"... I hold that it is not a violation of the statute if the conversation is recorded, manually, mechanically, or electrically, at the instance of or with the consent or knowing acquiescence of one of the parties to it."

That Court was squarely confronted with the question of whether to follow the rule of the *Polakoff* case or to adhere to that expressed in *United States v. Yee Ping Jong*. After a careful consideration of each case, it chose to apply the doctrine of the latter.

The *Lewis* case was reversed on other grounds, but insofar as we are concerned with it here, the decision remains unimpaired by reversal. *Billeci v. United States*, 184 F. 2d 394 (D. C. Cir. 1950). The problem discussed above apparently was not presented to the appellate court, but it was held there that a fact situation similar to that of *People v. Kelley, supra*, i.e., where officers enter the defend-

²⁴ 87 F. Supp. at p. 972.

ant's premises and answer telephone calls intended for the defendant, does not constitute an "interception."

This Court too has defined the term "interception," as it is used in Section 605 of the Federal Communications Act. *Goldman v. United States*, 316 U. S. 129 (1942). There government agents place a detectaphone against a partition wall in order to enable a stenographer to transcribe what the defendant, in the next room, said in a telephone conversation. Although the two cases present somewhat different facts, this Court gave the term "interception" a meaning which cannot be reconciled with the opinion in the *Polakoff* case, as follows:

"What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission. Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication within the terms of the Act until they are handed to an agent of the telegraph company. Words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of the section. Letters deposited in the Post Office are protected from examination by federal statute, but it could not rightly be claimed that the office carbon of such letter, or indeed the letter itself before it has left the office of the sender, comes within the protection of the statute. *The same view of the scope of the Communications Act follows from the natural meaning of the term 'intercept.'* As has rightly been held, this word indicates the

taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the same moment, it comes into the possession of the intended receiver. The listening in the next room to the words of Shulman as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room."²⁵ (Emphasis supplied).

In *Reitmeister v. Reitmeister*, 162 F. 2d 691, 694 (2d Cir. 1947), Judge Hand himself conceded that his opinion in the *Polakoff* case might have been overruled by this Court's decision in the *Goldman* case. One of his colleagues, in a concurring opinion, stated explicitly that it had been so overruled. It is therefore submitted that the decision of the Circuit Court of Appeals in *United States v. Polakoff* has not survived that of the Supreme Court of the United States in *Goldman v. United States*, and that here it should be expressly overruled.

The term "wire tapping" connotes the use of an apparatus surreptitiously attached to the telephone line for the purpose of overhearing a telephone conversation without the knowledge of either party to it.²⁶ "Interception" contemplates the taking or seizure of something by the way of or before arrival at

²⁵ 316 U. S. at pp. 133, 134.

²⁶ *United States v. Lewis*, *supra*, p. 972.

its expected destination.²⁷ As applied to a telephone message, the word implies that *neither* party consented that it be overheard.²⁸

In the case at bar, the conversations were overheard and recorded at the terminus of the telephone line. This was accomplished by the use of an induction coil which was not physically connected to either wire or receiver. The recordings were made with the acquiescence and cooperation of one of the parties to the conversations, and apparently with the knowledge of the other. Petitioner accepted some twelve to fifteen telephone calls from Jarrett and conversed with him at length in each, despite the fact that all along he harbored a suspicion that their conversations were being overheard and perhaps recorded. Thus the communications were not "intercepted," and there were no telephone wires "tapped."

The trend of the law in recent years has been in favor of the admissibility of evidence and against rigid rules of incompetence. Only last summer this Court sustained the admission of evidence obtained by an informer who recorded his conversation with the defendant by means of a small device concealed on his person. *On Lee v. United States*, 72 S. Ct. 967 (1952). This was upheld over the objection of the Federal Communications Act as a bar.

The use of the telephone is not a guarantee of the right of privacy. Evidence obtained by eavesdropping, in the form of disguises, binoculars, and the detectaphone—all clear violations of the right of privacy—is perfectly admissible against the person

²⁷ *Goldman v. United States*, *supra*, p. 134.

²⁸ *United States v. Lewis*, *supra*, p. 973.

under such surveillance. There can be no common sense distinction between the means employed to obtain the evidence in question here and any other form of eavesdropping done without unlawful trespass. If petitioner's theory of the case is adopted, the courts will be forced to reject the best evidence, contrary to all current trends in the law. One who wilfully violates the laws of his state should not be allowed to render himself virtually immune from local prosecution by the interposition of a federal statute which was never originally designed as a rule of evidence.

CONCLUSION

It is respectfully submitted that this case should be affirmed.

PRICE DANIEL
Attorney General of Texas

CALVIN B. GARWOOD, Jr.
Assistant Attorney General

HUGH LYERLY
Assistant Attorney General

WILLIAM S. LOTT
Assistant Attorney General

HENRY WADE
District Attorney,
Dallas County, Texas

RAY L. STOKES
Assistant District Attorney
Dallas County, Texas

November, 1952.

APPENDIX

THE FEDERAL COMMUNICATIONS ACT

47 U.S.C.A. § 605

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels or transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein

contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

CERTIFICATE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

I, Bill Shaw, Clerk of the Criminal District Courts of Dallas County, Texas, do hereby certify that my office made an error in copying the transcript of the proceedings in Cause No. 7768-AB, Styled *The State of Texas vs. Thomas Schwartz*, in the Criminal District Court No. 2 of Dallas County, Texas, which was prepared by this office and forwarded to the Court of Criminal Appeals at Austin. This transcript contains a typographical error in State's Exhibit "A" (Tr. 33), and the printed Transcript of Record filed in the Supreme Court of the United States, Cause No. 41, styled *Thomas Schwartz, Petitioner, vs. The State of Texas*, contains the same typographical error in State's Exhibit "A"—Affidavit of J. E. Sellers (R. 28). The following is a true and correct copy of the original exhibit on file in the records of this case:

THE STATE OF TEXAS }
COUNTY OF DALLAS }

I, J. E. SELLERS, am one and the same person who testified in regard to the State's Exhibit Nos. 4, 5, 6, 7, 8 and 9, in Cause No. 7768-A/B, The State

of Texas vs. Thomas Schwartz, in the Criminal District Court No. 2, Dallas County, Texas, January Term, 1951. The State's Exhibit Nos. 4, 5, 6, 7, 8 and 9 were recorded by me in the Dallas County Sheriff's Office. These recordings were made by the use of an induction coil connected to a recorder amplifier. The induction coil was held in proximity to the telephone. At the time of the making of these recordings I had ear phones on so that I fully know that these recordings are the true and same recordings as I heard the conversations through my ear phones as the recordings were being made. There was at no time any connection made with the telephone wires or any part thereof.

/s/ J. E. Sellers
J. E. SELLERS

SUBSCRIBED AND SWORN TO before me a Notary Public, by J. E. Sellers on this the 17th day of March, A. D. 1951.

/s/ Bobbie Smith
Notary Public in and for
Dallas County, Texas

State's Exhibit "A"

Given under my official Signature and Seal of Office, at Dallas, Dallas County, Texas on this the 10th day of October, A. D., 1952.

BILL SHAW,
District Clerk, Dallas
County, Texas

By BILLY G. BURDEN,
Deputy